Supreme Court, U.S.
FILED

94110 JUL 15 1994

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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MENACHEM PRI-HAR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR WRIT OF CERTIORARI

DONALD A. HARWOOD *
8 West 40th Street
Suite 900
New York, New York 10018
(212) 730-2689

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

1. Whether the circuit court and the district court erroneously denied Petitioner's motion for stay of execution of sentence and for release on bail pending appeal, where neither court made any written findings as required by law and where Petitioner established he was clearly entitled to be released on bail pending his appeal.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were those parties named in the caption of the case in this Court.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Menachem Pri-Har, respectfully requests that a Writ of Certiorari be issued to review an order of the United States Court of Appeals for the Second Circuit entered in the above-captioned proceeding on June 14, 1994.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Second Circuit denying Petitioner's motion for stay of execution of sentence and release on bail pending appeal bears the caption *United States of America v. Menachem Pri-Har,* Docket No. 94-1304, and is reprinted in the appendix hereto at p. 3a.

The Order of the United States District Court for the Southern District of New York (Sprizzo, D.J.) denying

Petitioner's motion for stay of execution of sentence and release on bail pending appeal was not written but is depicted in a transcript of a portion of the Petitioner's sentencing hearing on May 12, 1994, in *United States of America v. Menachem Pri-Har,* District Court Docket No. 93-CR-278, and is reprinted in the appendix hereto at p. 5a.

JURISDICTION

This Court has jurisdiction to review an order or judgment of the Court of Appeals under 28 U.S.C. Section 1254. The order of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered on June 14, 1994.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 3143 of Title 18 which reads in pertinent part as follows:

> (a) Release or detention pending sentence.—The judicial officer shall order that a person who has been found guilty of an offense and who is waiting imposition or execution of sentence, be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3142(b) or (c). If the judicial officer makes such a finding, he shall order the release of the person in accordance with the provisions of section 3142(b) or (c).
>
> (b) Release or detention pending appeal by the defendant.—The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has

filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—

> (1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3142(b) or (c); and
>
> (2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

If the judicial officer makes such findings, he shall order the release of the person in accordance with the provisions of section 3142(b) or (c).

Rule 10 of the Rules of the Supreme Court which reads in pertinent part as follows:

> Considerations Governing Review on Writ of Certiorari
>
> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> > (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision . . . .

Federal Rule of Appellate Procedure 8(a):

> (a) Stay Must Ordinarily Be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals. Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court. . . .

Federal Rule of Appellate Procedure 9(b) and (c):

> . . . (b) Release Pending Appeal from a Judgment of Conviction. Application for release after a judgment of conviction shall be made in the first instance in the district court. If the district court refuses release pending appeal, or imposes conditions of release, the court shall state in writing the reasons for the action taken. Thereafter, if an appeal is pending, a motion for a release, or for modification of the conditions of release, pending review may be made to the court of appeals or to a judge thereof. The

motion shall be determined promptly upon such papers, affidavits, and portions of the record as the parties shall present and after reasonable notice to the appellee. The court of appeals or a judge thereof may order the release of the appellant pending disposition of the motion.

(c) Criteria for Release. The decision as to release pending appeal shall be made in accordance with Title 18, U.S.C. Section 1343. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community and that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or in an order for a new trial rests with the defendant.

STATEMENT OF THE CASE

Mr. Pri-Har was convicted on January 14, 1994, following a jury trial in the Federal District Court for the Southern District of New York, Hon. John E. Sprizzo, D.J., presiding, of each and every count of a 24-count indictment charging him with, among other things, conspiracy to defraud the United States Department of Agriculture ("USDA") in relation to its grain subsidy program, entitled the Export Enhancement Program ("EEP"), and wire fraud, in violation of 15 U.S.C. § 714m(a) and 18 U.S.C. § 1343, and other counts of conspiracy to defraud various banks, and bank and wire fraud in violation of 18 U.S.C. §§ 371, 1014, 1343 and 1344.

On May 12, 1994, Mr. Pri-Har appeared for sentencing. Judge Sprizzo sentenced Pri-Har to 168 months' incarceration, to be followed by five years' supervised release. Judge Sprizzo also ordered Pri-Har to pay $39 million in restitution for losses allegedly sustained by the various banks, and imposed a $1 million dollar fine and a $1200 mandatory special assessment. Following the pronouncement of sentence, Pri-Har's counsel moved orally,

and by notice of motion dated April 18, 1994 [1], for a stay of execution of sentence and for release upon appropriate bail conditions pending appeal. The district court summarily denied the motion without making any written findings as required by Fed. R. App. P. 9(b), stating, "I don't think, on the facts of this case, at this stage of the game I have the discretion to grant bail pending appeal, and I surely would not, having not granted it prior to trial." 2a.

On May 27, 1994, Pri-Har filed a motion for bail pending appeal in the Second Circuit Court of Appeals, which is reprinted in the appendix hereto at pp. 6a-19a [2], together with a supporting memorandum of law which is also reprinted in the appendix hereto at pp. 20a-69a. In his moving papers, Pri-Har contended he was neither a risk of flght, nor a danger to any other person or the community, 8a-9a, and that his appeal would raise substantial legal and factual questions likely to result in a reversal or order for a new trial. 10a-19a. Pri-Har also complained of the district court's summary denial of the bail application, and argued that the district court's failure to make findings in accordance with Fed. R. App. P. 9(b) was ground alone to require reversal. *See* reply memorandum of law reprinted in the appendix hereto at pp. 70a-76a.

Despite the above, on June 14, 1994, the Second Circuit Court of Appeals issued an Order summarily denying Petitioner's motion for stay of execution and release on bail pending appeal. 1a. Remarkably, the circuit court—like the district court—did not make any

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[1] Petitioner's application for bail was incorporated in a post-trial motion pursuant to Fed. R. Crim. P. 29, in the event the Rule 29 motion was denied.

[2] For the sake of judicial economy and convenience, the appendices to the motion for bail pending appeal have not been reprinted because of their length, but they will be included in the joint appendix in the event this Court grants the writ for certiorari.

written findings regarding the basis of its denial of the motion. 1a.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD REVIEW THE PROPRIETY OF THE DENIAL OF THE PETITIONER'S MOTION FOR STAY OF EXECUTION OF SENTENCE AND FOR RELEASE ON BAIL PENDING APPEAL SINCE PETITIONER DEMONSTRATED HE WAS ENTITLED TO BAIL PENDING APPEAL, AND NEITHER THE CIRCUIT COURT NOR THE DISTRICT COURT MADE ANY WRITTEN FINDINGS IN SUPPORT OF THEIR DENIALS OF BAIL, AS REQUIRED BY LAW, THUS DEPARTING FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND RENDERING A DECISION IN CONFLICT WITH THE DECISIONS OF NUMEROUS OTHER CIRCUIT COURTS.

Fed. R. App. P. 9(b) requires that "the court shall state in writing the reasons" for refusing release pending appeal. Rule 9(b)'s writing requirement "performs a vital mission." *United States v. Jackson*, 417 F.2d 1154 (D.C. Cir. 1969). "Only if provided with reasons for the district court's decision, can an appellant intelligently renew a bail motion in the court of appeals." *United States v. Wheeler*, 795 F.2d 839, 841 (9th Cir. 1986). Without specific findings, an appellate court, ". . . cannot effectively review a bail motion decision." *Id. See United States v. Affleck*, 765 F.2d 944, 954 (10th Cir. 1985).

Accordingly, circuit courts have universally remanded cases for proper written findings in accordance with Rule 9(b) if the district court fails to provide either a written statement of reasons or at least a transcript reciting oral reasons. *United States v. Bishop*, 537 F.2d 1184 (4th Cir. 1976); *United States v. Briggs*, 472 F.2d 1229, 1230 (5th Cir. 1973); *United States v. Wheeler*, 795 F.2d 839, 841 (9th Cir. 1986); *United States v. Hart*, 779 F.2d 575 (10th Cir. 1985); *In re Smith*, 823 F.2d 401 (11th Cir. 1987); *United States v. Wong-Alvarez*,

779 F.2d 583 (11th Cir. 1985); *United States v. Jackson*, 417 F.2d 1154, 1156-57 (D.C.Cir. 1969). Indeed, prior to this case, the Second Circuit also required a remand where the district court's findings were neither written nor apparent from a transcript reciting oral reasons. *See United States v. Fields*, 466 F.2d 119 (2d Cir. 1972); *United States v. Manarite*, 430 F.2d 656, 657 (2d Cir. 1970). Moreover, several circuit courts, including the Second Circuit, have previously held that a district court's reasons for its decision must be adequately explained; conclusory statements are insufficient. *See United States v. Manarite*, 430 F.2d at 657 (extensive colloquy without a concluding statement of reasons for decision insufficient); *United States v. Stanley*, 469 F.2d 576, 584 (D.C. Cir. 1972) ("Without elucidation of the basis for the judge's action, we cannot fairly evaluate the merits of either the application or the judge's decision thereon"); *United States v. Thompson*, 452 F.2d 1333, 1336 n. 7 (D.C. Cir. 1971) ("A mere parroting of the provisions of the applicable statute is not an adequate substitute for a full statement of reasons."), *cert. denied*, 405 U.S. 998 (1972).

Circuit courts obviously are under the same obligation to state reasons for their decisions denying bail pending appeal, especially since a Circuit Judge of this Court has a nondelegable responsibility to make an independent determination of the merits of a bail application ". . . *where the reasons for the action below clearly appear* . . . ." *Harris v. United States*, 404 U.S. 1232 (1971) (Douglas, J., in chambers) (emphasis added). *See also Truong Dinh Hung v. United States*, 439 U.S. 1326, 1328 (1978) (Brennan, J., in chambers). If a circuit court does not state the reasons for its denial of bail pending appeal—like here—a Circuit Justice of this Court will be unable to properly perform its function of independently reviewing the propriety of the lower court's denial of bail.

This Court should review the propriety of the summary denial of Petitioner's motion for bail pending appeal since

neither the circuit court nor the district court made the required written findings upon which the denial was based as required by law. The circuit court decision departed from the accepted and usual course of judicial proceedings and sanctioned the departure of the district court which also failed to make findings, and the circuit court's decision is in conflict with the decisions of numerous other circuit courts which require written findings.[3] *See United States v. Bishop*, 537 F.2d at 1184 (4th Cir. 1976); *United States v. Briggs*, 472 F.2d at 1230 (5th Cir. 1973); *United States v. Wheeler*, 795 F.2d at 841 (9th Cir. 1986); *United States v. Hart*, 779 F.2d at 575 (10th Cir. 1985); *In re Smith*, 823 F.2d at 401 (11th Cir. 1987); *United States v. Jackson*, 417 F.2d at 1156-57 (D.C. Cir. 1969).

Moreover, this Court should order a stay of execution of sentence and bail pending Petitioner's appeal since the Petitioner clearly demonstrated in the lower courts that he was entitled to bail pending appeal.

Regarding risk of flight and/or dangerousness, Pri-Har established, among other things, that he had been con-

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[3] Rule 10 of the Rules of the Supreme Court provides in pertinent part:

> Considerations Governing Review on Writ of Certiorari
>
> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) *When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter*; or has decided a federal question in a way in conflict with a state court of last resort; *or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision* . . . .

(Emphasis added).

victed of a non-violent crime and had no prior criminal record. 8a-9a. Although an Israeli citizen, Pri-Har has resided and transacted business in the United States since November, 1983, and he has been the President of Red Rock Holdings, an agricultural commodities and trading firm in New York, since 1987. 8a-9a. Pri-Har also demonstrated that he owns several residential and commercial properties in the United States, and that his father, Zvi Friedenberg, resides in a condominium at 241 East 76th Street, Unit 9F, in New York City. 8a. For the past three years, Pri-Har has been engaged to an American citizen, Barbara Breest, who is the mother of their two-year-old-son, Dror Breest Pri-Har, also an American citizen. 8a. Pri-Har also established that he first became aware of the federal investigation in mid-March, 1992, while he was travelling overseas on business, and notwithstanding the pending investigation, he promtply returned to his Long Island home on March 27, 1993, and was arrested several days later. 9a. In addition, Pri-Har proffered a substantial bail package, including: (a) electronic at-home detention; (b) a waiver of extradition from any country in the world; and (c) execution of a personal recognizance bond in an amount to be determined by the Court, secured by various properties owned by numerous family members of Ms. Barbara Breest, the equity value of which totals approximately $273,609.00. 8a-9a.

Regarding the likelihood of success on appeal, Pri-Har established that Judge Sprizzo failed to properly charge the jury regarding the elements of wilfulness and knowledge in accordance with this Court's recent decision in *Ratzlaf v. United States,* —— U.S. ——, 114 S.Ct. 655 (1994), 12a-13a; erroneously denied Pri-Har's Rule 29 motion for evidentiary insufficiency as to each and every count of the indictment without making any written findings, 10a-11a; erroneously denied Pri-Har's post-trial Rule 33, on the ground that trial counsel had rendered ineffective assistance of counsel in his summation, with-

out making any written findings, 11a-12a; and made numerous other prejudicial errors in unfairly excluding evidence helpful to the defense, 13a-17a, and in sentencing Pri-Har. 17a.

More specifically, Judge Sprizzo's charge to the jury on the elements of wilfulness and knowledge was plain error since he instructed the jury that the government need not prove the defendant knew he was breaking a particular law. 12a-13a. This Court recently held in *Ratzlaf, supra,* that to prove "willfulness" in a currency reporting case, the government must show that the defendant acted with knowledge his structuring activity was unlawful—not just that his purpose was to circumvent a bank's reporting requirement. Although this Court apparently has not yet had the opportunity to determine whether the rationale of *Ratzlaf* should be extended to fraud charges like in the instant case, we contend the rationale of *Ratzlaf* is fully applicable here, thus requiring a reversal on each and every count of the indictment.[4] That the district court's error requires reversal is especially true since Mr. Pri-Har denied that he acted wilfully and with guilty knowledge regarding each of the counts of the indictment. 12a-13a.

Further, Pri-Har's Rule 29 motion overwhelmingly established Pri-Har's innocence in that the evidence was legally insufficient as to each and every count of the indictment. 30a-69a. In addition, Mr. Pri-Har maintained that the testimony of various bank officials, that he had orally misrepresented material facts to them to obtain loan financing, was utterly belied by the express language of numerous loan documents executed by the par-

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[4] At least one circuit court, the Third Circuit, has held the rationale of *Ratzlaf* should not necessarily be confined to currency reporting cases, extending *Ratzlaf* and requiring reversal because of a deficient wilfulness instruction in a campaign fraud case under 18 U.S.C. Sec. 1005. *United States v. Curran,* 20 F.3d 560, 567-569 (3d Cir. 1994).

ties, some of which even expressly disclaimed contrary oral representations. Pri-Har contended the testimony of these bank officials, including Craig Tashjian of Standard Chartered Bank, Barry Feigenbaum and Sharon Delezenski of BNP-New York, and Paul Feldman of ABN-ARMO Bank, was simply not worthy of belief, as was certainly true of the Government's principal witness, Isaac Fattal, an admitted perjurer. Fattal, upon whom the Government's case was in large part based, previously confessed to having committed perjury at Pri-Har's trial by denying he had spoken to one Albert Ohana prior to the trial. 18a-19a. Because this conversation was secretly recorded by Ohana, Fattal was forced to concede that such a conversation took place, during which, the defense maintained, Fattal clearly solicited a bribe of $250,000 in order not to testify against Pri-Har. 18a-19a.[5]

Mr. Pri-Har's Rule 33 motion convincingly established that he was deprived of the effective assistance of counsel because trial counsel did not advance numerous substantive defenses—*even though Pri-Har expressly directed counsel to raise such defenses in written summaries.* 11a-12a. Nor was there any "tactical" reason for counsel's omission since the defenses and evidence Pri-Har directed trial counsel to raise were, in fact, elicited by the defense in the examination of witnesses during the trial. 11a-12a.

Finally, Mr. Pri-Har also contended in his papers that although two pre-trial bail applications had been denied both by the district court and the circuit court, these applications were rejected in large measure because the Government had misrepresented that Pri-Har had secreted millions of dollars in bank accounts all around the world.

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[5] Regarding Fattal's testimony, Judge Sprizzo observed during the trial that "There are some people who can't say anything straight." 74a. Regarding Tashjian's testimony, Judge Sprizzo observed that the existence of the Red Rock/Olges contract was "some proof that suggests that maybe he [Tashjian] is not telling the truth on that." 74a.

17a-19a. At trial, it became clear that evidence did not exist to support the Government's assertion, prompting Judge Sprizzo to comment upon the lack of such evidence and the seemingly contradictory positions the Government had taken at trial and in prior bail hearings:

> THE COURT: . . . You [the prosecutor] say it dosen't matter whether they [the defendant and co-conspirators] got these subsidies or not. That is surely not the way you opened in this case. You opened in this case on the theory that he [Pri-Har] had enriched himself, *and it surely is not the position that you took before me on the bail application in this case.* So what I am saying to you is that you got up and you opened to the jury and you told the jury about all the money he made as a result of these subsidies and bank loans, right? MR. STEIN: That's correct, your Honor. THE COURT: Now you want me to tell the jury at the end that all of that didn't matter . . . .

Pri-Har also rebutted the Government's contention that Judge Sprizzo's finding at sentencing—that Pri-Har personally derived more than 5 million dollars in income from the so-called Bank of Tokyo fraud—demonstrated Pri-Har had diverted substantial sums of money. Judge Sprizzo's finding was based upon the uncorroborated testimony of the Government's principal trial witness, Isaac Fattal, that Pri-Har had borrowed 17 million dollars from the Bank of Toyko to refinance a 10 million dollar loan with Citibank, and that Pri-Har had instructed a Citibank official, Diane LaBasse, to wire an excess 5 million dollars into a Swiss bank account in Pri-Har's name. 18a-19a. In his moving papers, Pri-Har contended that no such transfer of 5 million dollars to a Swiss bank account ever took place, nor had Citibank officials supplied any documents evidencing such a transfer to a Swiss account. 18a-19a. The Government's own evidence at sentencing confirmed Fattal's second act of perjury (having previously been caught lying at Pri-Har's

trial) in the form of a copy of the Citibank loan/mortgage agreement in the amount of $15 million dollars, *not* $10 million dollars as indicated by Fattal, which established there wasn't an excess $5 million dollars to divert as indicated by Fattal.[6]

In sum, Petitioner, who steadfastly maintains his innocence, clearly shouldered his burden of demonstrating by clear and convincing evidence that he has no intention of fleeing and that his conviction will ultimately be reversed on appeal. Petitioner has suffered enough, having been incarcerated for over a year since his arrest and having been deprived of the love and company of his family, including his now two-year-old son. Given these circumstances, this Court should grant the petition for writ of certiorari and order a stay of execution of sentence and bail pending appeal. *Compare Truong Dinh Hung v. United States,* 439 U.S. at 1326 (allowing bail to convicted defendant, a Vietnamese citizen, facing 15-year sentence, because his appeal had merit and evidence did not establish a risk of flight in light of defendant's continuous residence within the country, ties in the community, and close relationship with sister who was American citizen).

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[6] An additional $1 million dollars from the 17 million dollar loan was owed and paid to Citibank because of the currency exchange —part of the original loan was in Swiss francs—and an additional $900,000.00 was paid to satisfy a second mortgage with a business entity named Alfa Laval.

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari should be granted. Otherwise, the practice of denying bail without either the circuit court or the district court making any written findings will continue, and will deprive not only the Petitioner but numerous other litigants of valuable rights guaranteed them by law but not afforded them by the Second Circuit.

Respectfully submitted,

DONALD A. HARWOOD *
8 West 40th Street
Suite 900
New York, New York 10018
(212) 730-2689

* Counsel of Record

APPENDIX

APPENDIX

[Filed May 27, 1994]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Dist. Ct. No. 93CR278 (JES)

UNITED STATES OF AMERICA

against

MENACHEM PRI-HAR,
Defendant—Appellant.

NOTICE OF MOTION FOR STAY OF EXECUTION OF SENTENCE AND RELEASE ON BAIL PENDING APPEAL

Has consent of opposing counsel:

A. been sought?	☒ Yes	☐ No
B. been obtained?	☐ Yes	☒ No
Has service been effected?	☒ Yes	☐ No
Is oral argument desired?	☒ Yes	☐ No

(Substantive motions only)

Requested return date: Speedy Date Requested of Clerk

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? ☐ Yes ☐ No

B. by firm date of argument notice? ☐ Yes ☐ No

C. If Yes, enter date: _____

Judge or agency whose order is being appealed:

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☒ Yes ☐ No

(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☒ No

If No, explain why not: This is a complicated case with a transcript in excess of 5000 pgs., and it will take some time to perfect.

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Judgment of conviction and sentence in the District Court for the Southern District, Sprizzo, D.J., presiding.

Brief statement of relief requested:

A stay of execution of sentence of imprisonment (14 years) and fine and restitution, with release on bail, pending appeal.

Complete Page 2 of this Form

By: *(Signature of attorney)*

/s/ Donald Harwood

Signed name must be printed beneath

/s/ Donald Harwood Date 5/27/94

Appearing for:
(*Name of Party*)

Menachem Pir-Har

Appellant or Petitioner:

☐ Plaintiff ☒ Defendant

Appellee or Respondent:

☐ Plaintiff ☐ Defendant

ORDER

Before: Hon. Joseph M. McLaughlin, Hon. Dennis G. Jacobs, CJJ and Hon. Jack B. Weinstein, D.

IT IS HEREBY ORDERED that the motion be and it hereby is *denied*.

Date 6/14/94

GEORGE LANGE III
Clerk

/s/ Edward J. Guardaro
EDWARD J. GUARDARO
Staff Attorney

Previous requests for similar relief and disposition:

There were two pre-trial bail requests denied by the district court and affirmed by this Court. These prior requests are discussed and distinguished in the supporting affidavit, pp. 14-15.

Statement of the issue(s) presented by this motion.

Whether the appellant's sentence should be stayed and appellant released on bail conditions pending the appeal of his conviction because appellant is not a risk of flight, and his appeal is likely to result in a reversal of his conviction and/or a new trial.

Brief statement of the facts *(with page references to the moving papers):*

On May 12, 1994, appellant was sentenced by Hon. John E. Sprizzo following a jury trial, of various conspiracy and bank fraud charges. The district court denied a Rule 29 motion, supporting affidavit, p. 5, and denied a Rule 33 motion on the ground of ineffective assistance of counsel, supporting affidavit, p. 6. Following sentencing, the district court also denied a motion to stay execution of the sentence and to release the appellant on bail conditions pending appeal.

Summary of the argument *(with page references to the moving papers):*

The appellant's sentence should be stayed pending appeal because the appellant does not pose a risk of flight, supporting affidavit, pp. 1-5, and he should be released on appropriate bail conditions, and because his appeal is likely to result in a reversal of his conviction, supporting affidavit, pp. 5-15.

Excerpt from Oral Findings of the
United States District Court
for the Southern District of New York

* * * *

MR. HARWOOD: I have just two more points that are real quick. I put in the Rule 29 motion a written request for stay of sentence pending appeal, stay of execution of sentence pending appeal.

THE COURT: He is in prison.

MR. HARWOOD: I just want to reiterate—

THE COURT: Stay of sentence? You mean you want him to lose good time? You mean you don't want him to get the benefit of time served? What are you talking about?

MR. HARWOOD: I am talking about he wants to be released pending appeal.

THE COURT: He is not going to be released pending appeal. Is that an application for bail pending appeal?

MR. HARWOOD: It was in the Rule 29 motion. I have to do it.

THE COURT: Denied.

MR. HARWOOD: And lastly, Judge—

THE COURT: I don't think, on the facts of this case, at this stage of the game I have the discretion to grant bail pending appeal, and I surely would not, having not granted it prior to trial.

MR. HARWOOD: Lastly, Judge, would you consider making an order that he be confined either in the MCC or Otisville, so that he doesn't get trucked out while the appeal is pending.

THE COURT: I will not enter such an order because I don't think I'm authorized to do that. I am not going to keep him there indefinitely. It is up to the Bureau of Prisons where he goes. If you need his assistance to file an appeal, you will have to find him.

You want me to hold him here for months? That is ridiculous.

* * * *

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Dist. Ct. No. 93 CR 278 (JES)

UNITED STATES OF AMERICA

-against-

MENACHEM PRI-HAR,

Defendants.

AFFIDAVIT OF COUNSEL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DONALD A. HARWOOD, an attorney licensed to practice law before this Court, being duly sworn, hereby deposes and says:

1. I am the attorney representing the defendant, MENACHEM PRI-HAR, on the appeal of a judgment of conviction and sentence in the Federal District Court for the Southern District of New York, the Honorable John E. Sprizzo, D.J., presiding, sentencing Pri-Har on May 12, 1994, to a term of 168 months imprisonment, a one-million dollar fine, restitution, and to be followed by a period of supervised release of five years.[1]

2. I have discussed this matter with Mr. Pri-Har and have thoroughly reviewed the trial transcripts and exhibits in this matter, and thus, I am fully familiar with the facts and circumstances herein.

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[1] Although a judgment has not yet been entered in the district court, Mr. Pri-Har filed a notice of appeal on May 20, 1994, a copy of which is annexed hereto as Exhibit "A".

3. I make this affidavit in support of Mr. Pri-Har's motion for a stay of execution of sentence pending appeal and further ordering his release upon appropriate bail conditions pursuant to Fed.R.Cr.P. 8 (b) and Fed.R.App. P. 9(b). This affidavit fully complies with the requirements of Local Rule 9.

4. Mr. Pri-Har is presentely confined at FCI-Otisville.

5. Mr. Pri-Har was convicted on January 10, 1994, following a jury trial, of each and every count of a 24-count indictment charging him with, among other things, conspiracy to defraud the United States Department of Agriculture ("USDA") in relation to its grain subsidy program and wire fraud in violation of 15 U.S.C. § 714m (a) and 18 U.S.C. § 1343, and conspiracy to defraud various banks and bank and wire fraud in violation of 18 U.S.C. §§ 371, 1014, 1343 and 1344. A copy of the indictment is annexed hereto as Exhibit "B".

6. At the sentencing hearing, Mr. Pri-Har moved orally, and by notice of motion dated April 18, 1994, for a stay of execution of sentence and for release upon appropriate bail conditions pending appeal. A copy of the April 18th motion is annexed hereto as Exhibit "C".

7. The district court summarily denied the motion, stating, "I don't think, on the facts of this case, at this stage of the game I have the discretion to grant bail pending appeal, and I surely would not, having not granted it prior to trial." *See* portion of sentencing transcript, pages 131-132, annexed hereto as Exhibit "D".

8. Under Fed.R.App.P. 9(b), the defendant concededly bears the burden of establishing that the defendant will not flee or pose a danger to any other person or to the community, and that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or in an order for a new trial. For reasons fully stated herein, and in the accompanying memorandum of law, this Court should allow the instant

motion for an order staying execution of Mr. Pri-Har's sentence and ordering his release upon appropriate bail conditions pending appeal.

Mr. Pri-Har Does Not Pose A Risk of Flight

9. Although an Israeli citizen, Mr. Pri-Har has resided and transacted business in the United States since November, 1983, and has been the President of Red Rock Holdings, an agricultural commodities and trading firm in New York, since 1987. He has no prior criminal record.

10. Pri-Har jointly owns with Ms. Sara Wolf, two residential properties in New York City, including a condominium at 241 East 76th Street (Unit 9F), and another condominium at 67 East 11th Street (Unit 424). He also has an ownership interest in two commercial properties, including an office building in Fort Lee, New Jersey, and a commercial property in Manhasset, New York. Although these properties cannot be posted for bail purposes since they are largely encumbered by mortgages or are the subject of litigation, they nonetheless underscore Mr. Pri-Har's substantial ties to this country.

11. Indeed, Mr. Pri-Har's father, Zvi Friedenberg, presently resides in Mr. Pri-Har's condominium at 241 East 76th Street (Unit 9F). Mr. Pri-Har's mother, Zepora nee Rosenwasser, resides in Tel Aviv, Israel, as does Pri-Har's brother, Amir Friedenberg.

12. For the past three years, Mr. Pri-Har has been engaged to an American citizen, Barbara Breest, who is the mother of their two-year-old son, Dror Breest Pri-Har.

13. The defendant proffers a substantial bail package, including: (a) electronic at-home detention; (b) a waiver of extradition from any country in the world; and (c) execution of a personal recognizance bond in an amount to be determined by the Court, signed and secured by various properties owned by numerous family members

of Ms. Barbara Breest. The equity value of these properties totals approximately $273,609.00. *See* affidavits of Breest family members annexed hereto as Exhibits "E1", "E2", "E3", "E4", "E5" and "E6".

14. Despite his conviction, Mr. Pri-Har steadfastly maintains his innocence of the crimes charged. If released upon appropriate bail conditions set by this Court, Pri-Har intends to aggressively pursue his appeal to overturn his conviction and to vindicate his damaged reputation.

15. Indeed, at this point, Pri-Har's prime motivation is to *remain* in this country—not only to overturn his conviction, but to undo the financial harm inflicted upon his interests in this country as a result of the instant prosecution. Mr. Pri-Har intends to hold accountable various bank officials, including those from Standard Chartered Bank and BNP-New York, whom Pri-Har maintains falsely testified at his trial, that he had defrauded them, simply because the banks entered into loan transactions which resulted in substantial losses.

16. Mr. Pri-Har has not previously avoided confronting the charges against him. He first became aware of the federal investigation in mid-March, 1992, while he was travelling overseas on business. Notwithstanding the pending investigation, he promptly returned to his Long Island home on March 27, 1993. On March 29, 1993, approximately one-week before his scheduled April 4th wedding to Ms. Breest, he was arrested, and has been incarcerated ever since.[2]

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[2] Mr. Pri-Har's being advised of the investigation is apparent from tape-recorded conversations introduced by the Government at trial. Indeed, in pre-trial bail applications, the Government has not challenged the assertion that Pri-Har returned to the United States after he was aware of the then pending federal investigation.

There is a Substantial Likelihood of Success on Appeal

17. The appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or in an order for a new trial. The points which will be raised on appeal include, but are not limited to, the following.

Denial of the Rule 29 Motion

18. During the trial, Pri-Har moved for the entry of a judgment of acquittal on each and every count of the indictment pursuant to Rule 29 of the Federal Rules of Criminal Procedure which the court denied (Trial Transcript, page 3522, hereinafter "T. 3522"). This motion was renewed at the close of the evidence (T. 4551, 5012), and by post-trial motion dated April 18, 1994. A copy of the Rule 29 motion is annexed hereto as Exhibit "C".

19. The district court summarily denied the Rule 29 motion at Mr. Pri-Har's sentencing on May 12, 1994. The district court rescinded an order it originally had allowed permitting the defense to file reply papers in response to the Government's opposition, indicating at the sentencing hearing that counsel could say in five minutes what would have been included in lengthy reply papers. Copies of the prior court order, and the relevant portions of the sentencing transcript, pp. 2-8, are annexed hereto as Exhibits "F" and "G", respectively.

20. The district court erroneously denied the Rule 29 motion because the Government's evidence was legally insufficient as to each and every count of the indictment for reasons fully for reasons fully stated in Point I of the accompanying Memorandum of Law dated May 27, 1994.

Denial of the Rule 33 Motion

21. By motion dated April 19, 1994, Pri-Har moved for a new trial on the ground that he was denied the effective assistance of counsel because his trial counsel, David Richman, Esq., did not effectively represent Pri-Har in his summation before the jury. A copy of the motion for new trial is annexed hereto as Exhibit "H".

22. The district court denied this motion as well at Mr. Pri-Har's sentencing on May 12, 1994. Exhibit "G".

23. The guilty verdict was the culmination of a lengthy, two-month trial which originally commenced on November 9, 1993. Numerous witnesses testified and numerous exhibits were introduced. Indeed, the trial transcripts in this case exceed 5000 pages.

24. The summation was arguably the most critical stage of the proceedings in light of the length of the trial and the voluminous evidence which the jury had to consider and comprehend in arriving at a verdict. Clearly, this was a complex case—even for lawyers, much less lay persons—and an effective summation was essential not only to revive the jurors' memories concerning key points, but to help them make sense of the evidence.

25. Trial counsel did not advance numerous, substantive arguments in Pri-Har's defense, despite the fact that many of these points were included in written summaries prepared by Pri-Har and provided to Mr. Richman.

26. The district court erroneously denied the Rule 33 motion because trial counsel's summation clearly deprived Mr. Pri-Har of the effective assistance of counsel for reasons fully stated in Point II of the accompanying Memorandum of Law.

District Court's Erroneous Jury Instructions Regarding Proof of Wilfulness and Guilty Knowledge

27. Mr. Pri-Har's guilty knowledge was a hotly-contested issue at trial. In his trial testimony, Pri-Har denied that he acted wilfully and with guilty knowledge regarding the various counts of the indictment (T. 3944-3946, 3959, 4020, 4082-4083, 4122, 4143-4144, 4171).

28. In charging the jury on the Government's proof regarding the elements of wilfulness and knowledge, the district court stated:

> THE COURT: You will see when we discuss all of these charges, that the words "unlawfully", "willfully", and "knowingly" appear in all of those charges. As I have told you, they are essential elements for the government to prove as to all of the counts charged, both the conspiracy counts and the substantive counts. What do they mean? Unlawfully means contrary to law. Willfully means that if an act is done voluntarily and with a bad purpose, that is, with a purpose to do something which the law forbids. An act is done knowingly if it is done purposefully and deliberately and not because of mistake, accident, mere negligence, or other innocent reason. The purpose of adding the requirements of knowingly and willfully to the criminal law is to be sure that a defendant is not convicted by inadvertent or careless conduct or conduct which results from honest mistake or good faith. *The government does not have to prove the defendant knew he was breaking a particular law, but they need only prove that the defendant was aware of the general unlawfulness of his act.*

(*See* T. 4890-91, annexed hereto as Exhibit "I").

29. Obviously concerned with the Government's proof on this point, the jurors asked the following question during their deliberations: "whether or not the defendant

knew the consequences of his alleged unlawful actions, i.e., that they could lead to possibly federal criminal prosecution." Without any elaboration, the district court simply instructed the jury:

> The answer to that question is no, it is not relevant to your determination. While I have charged you on knowledge and intent, awareness or knowledge that a person knows that his conduct will result in a criminal prosecution is not an element of the offense.

(*See* T. 4999-5001, annexed hereto as Exhibit "I").

30. The district court's instructions regarding the requisite proof of wilfulness and guilty knowledge were plain error and unconstitutionally relieved the Government of its burden of proof in violation of Mr. Pri-Har's due process rights under the Fifth Amendment for reasons fully stated in Point III of the accompanying Memorandum of Law.

District Court's Erroneous Exclusion of Defense Evidence Regarding Loan Documents and Financing of Emergency Wheat Program

31. Regarding counts ten through twelve of the indictment, the Government presented evidence indicating that Pri-Har defrauded various financing banks, including Standard Chartered Bank and BNP-New York, by orally misrepresenting to the banks they would be financing the purchase price of wheat from Israeli farmers under the Israeli Emergency Wheat Program ("IEWP"), which Pri-Har allegedly overstated was $254.35 per metric ton in an attempt to obtain excess monies, when in fact, the actual price of the wheat was much lower, totalling approximately $203.88 per metric ton.

32. In this regard, the district court permitted testimony from various bankers, including Craig Tashjian of Standard Chartered and Susan Delezenski of BNP-New York, interpreting various loan documents which they

claimed confirmed their belief that the banks were financing the purchase price of the wheat rather than its market value which admittedly might have been higher (Testimony of Craig Tashjian, T. 1673-1677, 1681-1682; Sharon Delezinski, T. 2657-2663, 2679-80, 2695-2696, annexed hereto as Exhibit "J").

33. In response, the defense attempted to elicit testimoney from its own witness, including Danny Avraham (an alleged co-conspirator) and Mr. Pri-Har, that the loan documents did *not* indicate the banks were financing the purchase price of the wheat, but rather, had approved financing based upon the Red Rock/Olges contract (Government Exhibit 400), not the Olges/Israeli farmers contract which included a pricing formula for the purchase price of the wheat (Testimony of Danny Avraham, T. 3671-3683; Testimony of Mr. Pri-Har, T. 4021, annexed hereto as Exhibit "J").

34. The district court's exclusion of this defense witness testimony, while at the same time admitting testimony from Government witnesses on this precise point, was prejudicial error, depriving Mr. Pri-Har of his Fifth Amendment right to present a full defense, and requiring a reversal of Mr. Pri-Har's conviction on counts ten through twelve of the indictment, for reasons fully stated in Point IV of the accompanying Memorandum of Law.

District Court's Erroneous Admission of Accountant's Works Papers Regarding Red Rock Financial Statements, And Its Exclusion of Defense Evidence of Overseas Venezuelan Deposits

35. Various counts of the indictment alleged that Pri-Har violated the bank fraud statute, 18 U.S.C. § 1344, by materially misrepresenting the financial status of RRC.

36. The Government attempted to show that year-end financial statements of RRC for 1989, 1990, and 1991 (Exhibits 601, 602, and 603, respectively), falsely

overstated the cash assets of RRC. Pri-Har supposedly orchestrated this over-valuation by obtaining at the end of each of the years short-term loans which were payable soon after the beginning of the new year.

37. The accountant who prepared the financial statements, Shelly Ganz, refused to testify without a grant of immunity, which the Government declined to give (T. 4494).

38. Mr. Pri-Har testified that the money allegedly overstated on the financial statements represented money in Red Rock accounts in Venezuela (T. 4276-81, 89). The defense proffered corroborating proof in the form of Red Rock foreign bank records from Venezuela, with a certificate of authenticity executed by the Consulate of the United States in Venezuela, which would have confirmed Pri-Har's testimony (*see* T. 3858-3866; 4583-4588, 4600-4605, annexed hereto as Exhibit "K").

39. The district court excluded the records on the ground that timely notice had not been given by the defense to the prosecution under 18 U.S.C. § 3505(b) which provides that a motion opposing the admission of such records be provided prior to trial (T. 3858-3866). However, the defense had just received the documents in the midst of trial, and had not anticipated the need for such records until the Government's presentation of testimony from Isaac Fattal (T. 4600). Further, defense disclosure of the Venezuelan documents on December 21, 1993, was just four days after the court-imposed deadline for disclosure of defense documents on December 17, 1994 (T. 3417-3418). Nonetheless, the district excluded the Venezuelan documents, and even permitted the Government to question Pri-Har about the lack of corroborating records and to comment upon the lack of records in summation (T. 4583-84).

40. Prejudice from the district court's exclusion of Venezuelan documents was exacerbated when the court

permitted the Government to introduce through its expert witness, Robert Lynch, over defense objection, the work papers of Shelly Ganz, produced pursuant to a subpoena, which apparently did not contain records of Venezuelan bank deposits—even though Ganz was not called by the Government as a witness to establish a proper foundation that these were the complete records used by him in preparing the Red Rock financial statements (*see* T. 4492-4496, annexed hereto as Exhibit "L").

41. The district court's exclusion of the defense proffer of Venezuelan bank records, coupled with its admission of the Ganz work papers offered by the Government without a proper foundation having been laid through Ganz, was prejudicial error, depriving Mr. Pri-Har of his Fifth Amendment right to present a full defense and his Sixth Amendment right to confront and cross-examine the evidence against him, requiring a reversal of Mr. Pri-Har's conviction on counts ten through twelve, eighteen and nineteen, and twenty through twenty-two, for reasons fully stated in Point V of the accompanying Memorandum of Law.

District Court's Erroneous Exclusion of 1985 Tax Return

42. In support of counts twenty-three and twenty-four of the indictment involving the Citibank and the Bank of Tokyo loans, the Government presented evidence indicating that Pri-Har submitted a December 1986 financial statement containing false information (Government Exhibit 902; T. 3033), listing a Bronx property valued at 1.5 million dollars belonging to someone else (testimony of Alex Zaika, T. 3090-3091), and a fictitious Brooklyn property valued at $2000.00 (Government Exhibit 902).

43. Pri-Har's defense was that he had been duped into thinking he owned the Bronx and Brooklyn properties by Neal Mandel, upon whom Pri-Har relied to manage Red Rock's real estate and who had Pri-Har's power of

attorney, and who subsequently had been fired by Pri-Har for misconduct (T. 4159-4170). Pri-Har testified he had in good faith reported income—and paid taxes—on the properties in his 1985 tax return (T. 4166).

44. In support of this defense, Pri-Har offered into evidence an unsigned copy of his 1985 tax return which, in fact, had been submitted to Citibank (Government Exhibit 905 and Defense Exhibit BY, T. 4167). The district court excluded this evidence, refusing to admit the 1985 tax return even though it clearly was a business record of Citibank, ruling that it was not sufficiently "trustworthy" given the allegations of fraud in the case (*see* T. 4176-4180, annexed hereto as Exhibit "M").

45. The district court's exclusion of the copy of the 1985 tax return was prejudicial error, depriving Mr. Pri-Har of his Fifth Amendment right to present a full defense, and thus requiring a reversal of Mr. Pri-Har's conviction on counts twenty-three and twenty-four of the indictment, for reasons fully stated in Point VI of the accompanying Memorandum of Law.

Sentencing Issues

46. The district court also committed errors in calculating Mr. Pri-Har's sentence which deserve comment in these papers in so far as Mr. Pri-Har undoubtedly will not be facing the 14-year prison sentence imposed in the lower court, as is fully set forth in Point VII of the accompanying Memorandum of Law.

Prior Bail Applications

47. While it is true that Pri-Har filed two pre-trial bail applications which were denied by the district court and affirmed by this Court, the prior applications were denied primarily because the Government represented that Pri-Har posed a substantial risk of flight because he allegedly had secreted millions of dollars in bank accounts all over the world.

48. At trial, however, it became clear the evidence did not support the Government's position that Pri-Har had diverted substantial monies into his own accounts, prompting the district court to comment upon the lack of such evidence and the seemingly contradictory positions the Government had taken at trial and in prior bail proceedings:

> THE COURT: . . . You [the prosecutor] say it doesn't matter whether they [the defendant and co-conspirators] got these subsidies or not. That is surely not the way you opened in this case. You opened in this case on the theory that he [Pri-Har] had enriched himself, *and it surely is not the position that you took before me on the bail application in this case.* So what I am saying to you is that you got up and you opened to the jury and you told the jury about all the money he made as a result of these subsidies and bank loans, right? MR. STEIN: That's correct, your Honor. THE COURT: Now you want me to tell the jury at the end that all of that didn't matter . . . .

(T. 1370-1371, annexed hereto as Exhibit "N"; *see also* T. 3131, "THE COURT: . . . It is true what you [Pri-Har] say, you know, that you didn't get all the money to go into your pocket . . . .", annexed hereto as Exhibit "N").

49. In response, the Government will undoubtedly argue that the district court subsequently found at the sentence hearing that Pri-Har had personally derived more than 1 million dollars in income in connection with the Bank of Toyko loan transaction. This finding was based upon the testimony of the Government's principal witness, Isaac Fattal, that Pri-Har had instructed a Diane LaBasse of Citibank—which held an outstanding loan that Bank of Toyko was refinancing—to wire in excess of 5 million dollars into a Swiss bank account in Pri-Har's

name (*see* sentencing transcript, pp. 76-78, 97-100, annexed hereto as Exhibit "O").

50. At the request of the defendant, the truth of Fattal's testimony regarding this point is presently being investigated by Citibank officials (*see* copy of defense May 18th letter to Judge Sprizzo with attachments, annexed hereto as Exhibit "P"). Upon information and belief, no such transfer of 5 million dollars to a Swiss bank account ever took place.

51. Indeed, Fattal, the Government's principal witness at trial, is an admitted liar, conceding at trial that he had lied in front of the jury regarding the circumstances of a meeting with one Albert Ohana prior to the trial, which was secretly recorded by Ohana, during which—the defense maintained—Fattal had solicited a bribe of $250,000 in order not to testify against Pri-Har (*see* T. 2056-2061, annexed hereto as Exhibit "Q").

Counsel's Certification Pursuant to Local Rule 9

52. Pursuant to Local Rule 9, I hereby certify that the appeal is not taken for purposes of delay.

WHEREFORE, deponent respectfully requests that the within motions be granted.

Sworn to and signed under penalties of perjury this 27th day of May, 1994.

/s/ Donald A. Harwood
DONALD A. HARWOOD

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Dist. Ct. No. 93 CR 278 (JES)

UNITED STATES OF AMERICA

-against-

MENACHEM PRI-HAR,
Appellant-Defendant.

MEMORANDUM OF LAW IN SUPPORT OF APPELLANT PRI-HAR'S MOTION FOR STAY OF SENTENCE AND RELEASE ON BAIL PENDING APPEAL

PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted on behalf of appellant Menachem Pri-Har in support of his motion for a stay of execution of sentence pending appeal and further ordering his release upon appropriate bail conditions pursuant to Fed.R.Civ.P. 8(b) and Fed.R. App.P. 9(b). The facts are set forth in the accompanying affidavit of Mr. Pri-Har's counsel, Donald A. Harwood, Esq., dated May 2, 1994, and in the supporting exhibits (collectively referred to as "the Harwood Affidavit").

STANDARD OF REVIEW

The appellant acknowledges that under Rule 9(b):

> The decision as to release pending appeal shall be made in accordance with Title 18 Section 3143.

> The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community and that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or in an order for a new trial rests with the defendant.

For reasons that follow, this Court should allow the instant motion for an order staying execution of Mr. Pri-Har's sentence and ordering his release upon appropriate bail conditions pending appeal.[1]

MR. PRI-HAR DOES NOT POSE A RISK OF FLIGHT OR DANGER TO OTHERS

We have demonstrated in the accompanying motion papers that Mr. Pri-Har does not pose a risk of flight, nor is he a danger to others. Harwood Affidavit, ¶¶ 9 through 16.

Mr. Pri-Har has resided and transacted business in the United States since November, 1983. Harwood Affidavit, ¶ 9. He has substantial ties to this country, including a fiance, Barbara Breest, and their two-year-old son, Dror Breest Pri-Har, and he owns various properties and has business interests within the United States. Harwood Affidavit, ¶¶ 10-12. He has no prior criminal record. Harwood Affidavit, ¶ 9.[2]

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[1] The district court summarily denied the motion, in part because it was of the misimpression it had no discretion to order Mr. Pri-Har's release pending appeal: *"I don't think, on the facts of this case, at this stage of the game I have the discretion to grant bail pending appeal,* and I surely would not, having not granted it prior to trial" (*see* Exhibit "D" to the accompanying motion). In any event, the district court also rejected the defense motion because it had denied the defendant bail prior to trial. Exhibit "D".

[2] These facts regarding Pri-Har's background appeared in the pre-sentence report and were not contested by the Government.

Mr. Pri-Har has proffered a substantial bail package, including: (a) electronic at-home detention; (b) a waiver of extradition from any country in the world; and (c) execution of a personal recognizance bond in an amount to be determined by the Court, signed and secured by various properties owned by numerous family members of Ms. Barbara Breest. The equity value of these properties totals approximately $273,609.00. *See* affidavits of Breest family members annexed to the motion as Exhibits "E1", "E2", "E3", "E4", "E5" and "E6". Obviously, Mr. Pri-Har has no intention of fleeing, since to do so would collectively deprive all of the members of Ms. Breest's family of all of their property.

THERE IS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON APPEAL

Mr. Pri-Har's appeal raises numerous questions of law likely to result in reversal or in an order for a new trial. The points which Pri-Har will raise on appeal include the following.

POINT I

THE DISTRICT COURT ERRONEOUSLY DENIED MR. PRI-HAR'S RULE 29 MOTION

At trial, and by notice of motion dated April 18, 1994, Mr. Pri-Har attacked the sufficiency of the evidence with regard to each and every count of the 24-count indictment (*see* Exhibit "C" to the motion). In support of his challenge to the sufficiency of the evidence, Mr. Pri-Har incorporates by reference herein his district court memorandum dated April 19, 1994, which is annexed hereto as Exhibit "A". It is clear from this memorandum that the evidence was legally insufficient as to every count in the indictment.

Further, the credibility of important Government witnesses was severely undercut at Mr. Pri-Har's trial. The Government's principal witness, Isaac Fattal, admitted at

trial that he had lied in front of the jury regarding the circumstances of a meeting with one Albert Ohana prior to the trial, which was secretly recorded by Ohana, during which—the defense maintained—Fattal had solicited a bribe of $250,000 in order not to testify against Pri-Har (*see* T. 2056-2061, annexed to the motion as Exhibit "Q"). When caught lying at the trial, Fattal claimed he made up statements in the conversation to appease Ohana because he was afraid of Pri-Har. Fattal's explanation was simply not credible, however, since during the conversation, Ohana asks Fattal at one point about "the money you [Fattal] asked for" (*see* pp. 38-39 of transcript annexed hereto as Exhibit "B").

Likewise, the testimony of Craig Tashjian of Standard Chartered Bank was seriously questioned at trial. According to Tashjian the Olges/Israeli farmers contract, including a pricing formula for the purchase price of the wheat, was supposed to be attached to the Red Rock/Olges/Standard Chartered but was not (T. 1751-1753). Tashjian testified that a Standard Chartered bank attorney requested, by letter to Red Rock, a copy of the Olges/farmers contract, but the contract was never received (T. 1751-1753). Tashjian also testified that various internal bank memoranda confirmed it was his belief that the formula in Appendix A of the Red Rock/Olges contract represented the price that Olges was going to pay to the Israeli farmers (T. 1830). The credibility of Tashjian's testimony was seriously undercut because the Government was unable to produce any of the above-stated documents to corroborate Tashjian's testimony—even though all of Standard Chartered's files, which presumably would have contained such documents, had been subpoenaed for trial (T. 1751-1753, 1828-1330, 1855-1856).

With the Government's case built on such questionable testimony, Mr. Pri-Har's Rule 29 argument is all the more strong.

POINT II

THE DISTRICT COURT ERRONEOUSLY DENIED MR. PRI-HAR'S RULE 33 MOTION

Strickland v. Washington, 466 U.S. 668 (1984) sets forth the two-part test to be applied in evaluating whether counsel's ineffectiveness deprives a defendant of his Sixth Amendment right to counsel. First, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 668. Second, a defendant must establish prejudice from his attorney's deficient performance. *Id.* at 692. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694-695.

Here, Mr. Pri-Har demonstrated in his moving papers that he was entitled to a new trial because he was deprived of the effective assistance of counsel by his trial counsel's summation, which failed to raise numerous substantial defenses that Pri-Har had specifically asked counsel to raise. *In re "Agent Orange" Product Liability Litigation,* 800 F.2d 14, 17 (2d Cir. 1986) ("As a matter of professional responsibility, an attorney owes a duty of loyalty to his client. The duty encompasses an obligation to defer to the client's wishes on major litigation decisions . . . .")

POINT III

THE DISTRICT COURT'S ERRONEOUS JURY INSTRUCTIONS REGARDING WILFULNESS AND GUILTY KNOWLEDGE

The district court's charge to the jury on the elements of wilfulness and knowledge, instructing the jury the government need not prove the defendant knew he was breaking a particular law (*see* T. 4890-91, annexed to the motion papers as Exhibit "I"), was plain error in

this case. *Ratzlaf v. United States,* —— U.S. ——, 114 S.Ct. 615 (1994) (to prove "willfulness" in currency reporting case, government must show defendant acted with knowledge his structuring activity was unlawful, not just that his purpose was to circumvent a bank's reporting requirement). That the court's error requires reversal is especially true since Mr. Pri-Har denied that he acted wilfully and with guilty knowledge regarding the various counts of the indictment. Harwood Affidavit ¶ 27.

POINT IV

THE DISTRICT COURT'S ERRONEOUS EXCLUSION OF DEFENSE EVIDENCE RE: LOAN DOCUMENTS AND FINANCING OF THE EMERGENCY WHEAT PROGRAM

The district court erroneously prevented the defense from eliciting relevant testimony from its witnesses, including Danny Avraham and Mr. Pri-Har, that loan documents did *not* indicate that financing banks were financing the purchase price of the wheat, especially since the court had admitted testimony from Government witnesses on this precise point. Harwood Affidavit ¶¶ 31 through 34. The district court's ruling deprived Mr. Pri-Har of his Fifth Amendment right to present a full defense, and thus requires a reversal of Mr. Pri-Har's conviction on counts ten through twelve of the indictment.

POINT V

THE DISTRICT COURT'S ERRONEOUS ADMISSION OF ACCOUNTANT'S WORK PAPERS, AND ITS EXCLUSION OF DEFENSE EVIDENCE OF OVERSEAS DEPOSITS

The Government attempted to show that year-end financial statements of RRC for 1989, 1990, and 1991 (Exhibits 601, 602, and 603, respectively), falsely overstated the cash assets of RRC. Mr. Pri-Har testified

that the money allegedly overstated on the financial statements represented money in Red Rock accounts in Venezuela (T. 4276-81, 89). The defense proffered corroborating proof in the form of Red Rock foreign bank records from Venezuela, with a certificate of authenticity executed by the Consulate of the United States in Venezuela, which would have confirmed Pri-Har's testimony (*see* T. 3858-3866; 4583-4588, 4600-4605, annexed hereto as Exhibit "K").

The district court erroneously excluded the records on the ground that timely notice had not been given by the defense to the prosecution under 18 U.S.C. § 3505(b), which requires that a motion opposing admission of such documents be filed prior to trial (T. 3858-3866). The defense had just received the documents in the midst of trial, and had not anticipated the need for such records until the Government's presentation of testimony from Isaac Fattal.[3] Nonetheless, the district excluded the Venezuelan documents, and even permitted the Government to question Pri-Har about the lack of corroborating records and to comment upon the lack of records in summation (T. 4583-84).

Prejudice from the district court's exclusion of Venezuelan documents was exacerbated when the court permitted the Government to introduce through its expert witness, Robert Lynch, over defense objection, the work papers of Shelly Ganz, produced pursuant to a subpoena, which apparently did not contain records of Venezuelan bank deposits—even though Ganz was not called by the Government as a witness to establish a proper foundation that these were the complete records used by him in preparing the Red Rock financial state-

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[3] Further, defense disclosure of the Venezuelan documents on December 21, 1993, was just four days after the court-imposed deadline for disclosure of defense documents on December 17, 1994 (T. 3417-3418).

ments (*see* T. 4492-4496, annexed hereto as Exhibit "L"). The Government's failure to immunize Ganz and thus make him available as a witness deprived the defense of the opportunity to cross-examine Ganz whether Red Rock had monies in Venezuela accounts which accounted for the monies referred to in the financial statements.

In sum, the district court's exclusion of the defense proffer of Venezuelan bank records, coupled with its admission of the Ganz work papers offered by the Government without a proper foundation having been laid through Ganz, deprived Mr. Pri-Har of his Fifth Amendment right to present a full defense and his Sixth Amendment right to confront and cross-examine the evidence against him, thus requiring a reversal of Mr. Pri-Har's conviction on counts ten through twelve, eighteen and nineteen, and twenty through twenty-two. *Bruton v. Missouri*, 391 U.S. 123 (1968).

POINT VI

THE DISTRICT COURT'S ERRONEOUS EXCLUSION OF THE 1985 TAX RETURN

Likewise, the district court erred by precluding the defense from introducing into evidence an unsigned copy of his 1985 tax return, which was admissible as a business record because it had been submitted to Citibank to obtain the loan in question. Harwood Affidavit ¶¶ 42 through 45. The proffered evidence would have corroborated Pri-Har's defense that he had been duped into thinking he owned the Bronx and Brooklyn properties by Neal Mandel, upon whom Pri-Har relied to manage Red Rock's real estate and who had Pri-Har's power of attorney, and who subsequently had been fired by Pri-Har for misconduct. Harwood Affidavit ¶¶ 42 through 45. The district court's exclusion of the tax return deprived Mr. Pri-Har of his Fifth Amendment right to present a full defense, thus requiring a reversal of Mr. Pri-Har's

conviction on counts twenty-three and twenty-four of the indictment.

POINT VII

DISTRICT COURT ERRORS IN SENTENCING

The district court also committed errors in calculating Mr. Pri-Har's sentence which deserve comment in these papers in so far as Mr. Pri-Har undoubtedly will not be facing the 14-year prison sentence imposed in the lower court. First, the district court erroneously calculated the amount of loss with regard to the RAM steel fraud, ruling as a matter of law that pending litigation which sought the recovery of losses from third parties should not be considered in reducing the alleged victim bank's losses. Contrary to the district ruling, the expected recovery was not speculative and thus should have considered in determining the fraud loss. *United States v. Mayo,* 14 3d 128, 133 (2d Cir. 1994). Second, the district court erroneously enhanced Pri-Har's sentence four offense levels for being an organizer of leader of five or more persons without making any findings as to which five people the defendant supposedly managed. Third, the district court erroneously enhanced Pri-Har's sentence two levels for obstruction of justice without making adequate post-trial findings regarding this point. Lastly, the district court erroneously enhanced Pri-Har's sentence four offense levels on the ground that Pri-Har personally derived more than 1 million dollars in gross receipts based upon the testimony of Isaac Fattal, who admitted lying at trial, the truth of which is presently being investigated by Citibank at the request of the defendant (*see* sentencing transcript, 30-34, 65-66, 66-70, 76-78, 97-100, 108-115). Harwood Affidavit ¶¶ 49-51.

CONCLUSION

In light of the foregoing, the defendant respectfully requests that this motion be granted in its entirety.

Respectfully submitted,

/s/ Donald A. Harwood,
DONALD A. HARWOOD, ESQ.
Attorney for Defendant
Menachem Pri-Har
8 West 40th Street, Suite 900
New York, New York 10018
(212) 730-2689

DATED: New York, New York
May 27, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. S5 93 CR 278 (JES)

UNITED STATES OF AMERICA

-against-

MENACHEM PRI-HAR, *et al.*,
Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT PRI-HAR'S MOTION FOR A JUDGMENT OF ACQUITTAL

PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted on behalf of defendant Menachem Pri-Har in support of his motion, pursuant to Rule 29(c), Fed. R. Crim. P., seeking an Order granting a judgment of acquittal on all counts of the 24-count indictment which were tried before the jury.

STANDARD OF REVIEW

The standard for a motion of acquittal made after the discharge of the jury is the same as on a motion at the close of the government's case or all of the evidence. C. Wright, *Federal Practice and Procedure,* Section 465, p. 652 (2d Ed. 1982). In defining the standard, the Court of Appeals has held:

> When a defendant moves for a judgement of acquittal, the Court must determine whether upon the evidence giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If [it] concludes that upon the evidence there must be such a doubt in a reasonable mind, [it] must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If [it] concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, [it] must let the jury decide the matter. (Footnotes omitted).

United States v. Mariani, 725 F.2d 862, 865 (2d Cir. 1984); *United States v. Taylor,* 464 F.2d 240, 243 (2d Cir. 1972).

Stated differently, " 'The relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact, could have found the essential elements of the crime beyond a reasonable doubt.' " *United States v. Starr,* 816 F.2d 94, 98 (2d Cir. 1987), quoting *Jackson v. Virginia,* 443 U.S. 307, 319 (1979).

In deciding a motion pursuant to Rule 29, the trial court admittedly must resolve all favorable inferences in favor of the prosecution and "view the evidence in the light most favorable to the government with respect to each element of the offense." *United States v. Mariani,* 725 F.2d at 865; *United States v. Rodriguez,* 702 F.2d 38, 41 (2d Cir. 1983); *United States v. Artso,* 618 F.2d 192 (2d Cir.), *cert. denied,* 449 U.S. 861 (1981). The evidence must be viewed "not in isolation but in conjunction." *United States v. Geaney,* 417 F.2d 1116, 1121 (2d Cir.), *cert. denied,* 397 U.S. 1029 (1970). The court may not substitute its own determination of the

credibility of witnesses, the weight of the evidence and the reasonable inferences to be drawn from the evidence. That is for a jury to determine. *United States v. Mariani,* 725 F.2d at 865; *United States v. Rodriguez,* 702 F.2d at 41.

Here, a thorough review of the evidence mandates a determination by this Court of legal insufficiency, and the entry of a judgment of acquittal on each and every count on the indictment because, regarding each count, there can only exist "a doubt in a reasonable mind." *United States v. Mariani,* 725 F.2d at 865.

ARGUMENT

POINT ONE

THE COURT MUST ENTER A JUDGMENT OF ACQUITTAL ON COUNTS THIRTEEN THROUGH SEVENTEEN OF THE INDICTMENT REGARDING THE SO-CALLED "DRESDNER BANK FRAUD", BECAUSE THE GOVERNMENT DID NOT PROVE THAT MR. PRI-HAR INTENDED NOR CONTEMPLATED ANY HARM OR INJURY TO THE BANK, NOR DID IT INTRODUCE SUFFICIENT EVIDENCE OF A FRAUDULENT SCHEME WITH A CAPACITY TO DEFRAUD PERSONS OF "ORDINARY PRUDENCE AND COMPREHENSION." FURTHER, THE EVIDENCE DID NOT SUPPORT A FINDING THAT THE ALLEGED WIRE FRAUD FURTHERED A SCHEME TO OBTAIN TAPIOCA FINANCING. LASTLY, THE EVIDENCE DID NOT SUPPORT THE CHARGES IN THE INDICTMENT THAT RED ROCK'S WHEAT SALES IN ISRAEL WERE FICTITIOUS OR THAT PRI-HAR KNOWINGLY WILFULLY ATTEMPTED TO DEFRAUD DRESDNER BANK.

Counts Thirteen through Seventen of the Indictment allege, among other things, that Mr. Pri-Har conspired and did in fact violate the wire fraud statute, 18 U.S.C. §§ 1343, by attempting to regain control of the Israeli Emergency Wheat Program through the creation and submission of documents to the Dresdner Bank via fax communications on February 5, February 8, February 9, and February 10, 1993, reflecting fictitious sales of wheat (Counts Fourteen through Seventeen, respectively). In each count, the Government also alleges that Pri-Har acted in relation to an application for financing for a shipment of tapioca to Bulgaria. The Government further alleges that Pri-Har acted with an intent to "defraud and to obtain money and property by means of false and fraudulent pretenses . . ."

A. The Evidence Did Not Demonstrate A Fraudulent Intent By Pri-Har To Cause Harm To Dresdner Bank

An essential element of the government's proof in a mail or wire fraud prosecution is proof of a "scheme or artifice to defraud." 18 U.S.C. §§ 1341, 1343. Critical to a showing of a scheme to defraud is proof that a defendant possessed a fraudulent intent. In this regard, the Second Circuit has stated:

> Although the government is not required to prove actual injury, it must, at a minimum, prove that defendants contemplated some actual harm or injury to their victims. Only a showing of intended harm will satisfy the element of fraudulent intent.

United States v. Starr, 816 F.2d at 98, relying on *United States v. Regent Office Supply Co.,* 421 F.2d 1174, 1181 (2d Cir. 1970) (". . . statute does require evidence from which it may be inferred that some actual injury to the victim, however slight, is a reasonably probable result of the deceitful representations . . .").

At trial, the Government did not introduce any evidence from which a reasonable juror could infer that Mr. Pri-Har contemplated any actual harm or loss to the Dresdner Bank. To the contrary, the undisputed evidence revealed that Pri-Har's purpose in submitting the allegedly fictitious documents [1]—reflecting wheat sales of Red Rock Commodities in Israel—was *not* to borrow money, but rather, was simply to prompt Dieter Wirschky, a Dresdner official, to influence other lending banks involved in the Israeli Emergency Wheat Program to permit Pri-Har to regain control of the program (Trial Transcript, pages 2180 and 2184, hereinafter referred to as "T. 2180, 2184). Wirschky supported such a plan because he concurred with Pri-Har that the court-appointed liquidator was selling off wheat reserves, including those financed by Dresdner, at very low prices which did not reflect actual market prices (T. 2180-2185). According to Wirschky, Pri-Har, ". . . wanted to be in a position to get higher prices for the wheat, *which of course would have been good for us* . . . ." (T. 2186) (emphasis added). Indeed, Wirschky was convinced that Dresdner would *lose* money if Pri-Har was unable to get back into the wheat program to sell the wheat at higher prices (T. 2255). Thus, rather than show an intent to cause harm, the trial evidence established beyond cavil an intent by Pri-har to benefit Dresdner bank by regaining control of the wheat program, selling the wheat at higher prices, and repaying the outstanding loans.[2]

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[1] Assuming, for argument's sake, the jury could conclude the documents submitted at Pri-Har's behest were false, this alone would not support the convictions. "Misrepresentations amounting only to a deceit are insufficient to maintain a male or wire fraud prosecution. *Instead, the deceit must be coupled with a contemplated harm to the victim.*" *United States v. Starr,* 816 F.2d at 98 (emphasis added).

[2] Issac Fattal testified the receiver was selling wheat at prices that were "very low", and that Pri-Har felt he could sell it "at far more than the value of what the receiver was selling it at because we would give credit terms and other facilities to the millers which

Further, any argument that an intent to defraud was made out simply because Pri-Har stood to *benefit* from regaining control of the wheat program—a point urged by the Government at trial (T. 3617)—is meritless.

> While a finding that defendants garnered some benefit from their scheme may be helpful to the jury to establish motive, it cannot be probative of fraudulent intent unless it results, or is contemplated to result, from a corresponding loss or injury to the victim of the fraud.

United States v. Starr, 816 F.2d at 101 (defendant's appropriation of a benefit, standing alone, does not make out an intent to defraud).

B. The Evidence Did Not Demonstrate A Fraudulent Scheme Reasonably Calculated To Deceive Persons Of Ordinary Prudence and Comprehension

In a mail or wire fraud case, the Government must also demonstrate that the defendant's fraudulent scheme could be "reasonably calculated" to deceive persons of "ordinary prudence and comprehension." *Kehr Packages, Inc. v. Fidelcor, Inc.,* 926 F.2d 1406, 1415 (3d. Cir. 1991), *cert. denied,* 111 S.Ct. 2839, citing *United States Pearlstein,* 576 F.2d 531, 535 (3d Cir. 1978). *See Regent Office Supply Co.,* 421 F.2d at 1181.

Here, the evidence was insufficient from which to infer that Pri-Har's alleged fraudulent acts or scheme were "reasonably calculated" to deceive persons of "ordinary prudence and comprehension." In order for Pri-Har to regain control of the wheat program, Wirschky told Pri-Har he would need documentation submitted *directly* from the Israeli banks confirming that Red Rock had been paid monies on its wheat sales (T. 2191, 2197). Despite these instructions, Pri-Har submitted documenta-

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he [the receiver] would not do and, therefore, be able to receive a higher price . . ." (T. 690).

tion only from Red Rock regarding its wheat sales in Israel (T. 2190-2191). According to Wirschky, the Red Rock documentation was worthless without corresponding proof of payments coming directly from the Israeli banks (T. 2298). Since such documentation was not forthcoming, Wirschky never approached the other lending banks with Pri-Har's proposal to regain control of the wheat program (T. 2202, 2208).

On this evidence, therefore, the alleged fraudulent scheme could not be "reasonably calculated" to deceive persons of "ordinary prudence", *Regent Office Supply Co.*, 421 F.2d at 1181, since Pri-Har failed to submit corresponding proof of wheat sales from Israeli banks despite Wirschky's insistence on such proof.

C. The Evidence Did Not Support The Charges Relating to The Proposed Tapioca Financing

The government must prove that the wire transmission which forms the basis for the fraud count was made for the purpose of executing the fraudulent scheme. *Kann v. United States,* 323 U.S. 88, 89 (1944) (mail fraud statute makes criminal only those mailings which are made for the purpose of executing the fraudulent scheme). "[T]he question is whether or not the . . . [wire transmissions] . . . were sufficiently closely related to the defendant's scheme to bring his conduct within the statute." *United States v. Price,* 623 F.2d 587, 593 (9th Cir. 1980), citing *United States v. Maze,* 414 U.S. 395, 400 (1974). Regarding the nexus required, the Second Circuit has stated, "[T]he deceit practiced must be related to the contemplated harm, and that harm must be found to reside in the bargain sought to be struck." *United States v. Schwartz,* 924 F.2d 410, 420 (2d Cir. 1991).

Here, the Government did not show a sufficient nexus between Red Rock's allegedly fraudulent wire transmissions regarding fictitious wheat sales in Israel, and its

application for financing a shipment of tapioca to Bulgaria. Wirschky testified that Pri-Har, when discussing the wheat program, mentioned wanting to continue new business with Dresdner Bank, including the financing of a tapioca transaction, but no specifics of such a transaction—such as the date, quantity, or amount of the financing—were described (T. 2184). Utterly lacking was any proof that the fraudulent wire communications, allegedly reflecting fictitious wheat sales in Israel, substantially furthered a scheme by Pri-Har to obtain financing for tapioca in Bulgaria. Without such proof, Pri-Har's convictions cannot stand. *United States v. Cassiere*, 4 3rd. 1006 (1st. Cir. 1993) (government must show that use of wire communications furthered fraudulent scheme).

D. The Evidence Did Not Support The Charges That Red Rock's Sales of Wheat In Israel Were Fictitious Or That Pri-Har Knowingly and Wilfully Attempted to Defraud Dresdner Bank

Lastly, although the evidence warranted an inference that various aspects of actual wheat sales may have been misrepresented, such as specific dates of sale, it also indicated that Red Rock unquestionably sold wheat in Israel via its agent, Olges, and at a price of approximately $190.00 per metric ton plus the 18% value added tax ("VAT"), for a total of approximately $224.00 per metric ton (Fattal Testimony, T. 1108, 1117; Avraham Testimony, T. 3720; Defense Exhibit BT). Thus, the evidence did not support the charges in the indictment that Red Rock's sales of wheat in Israel were "fictitious."

Accordingly, the evidence did not establish that Pri-Har knowingly and wilfully attempted to defraud Dresdner Bank, or do anything criminal in nature, especially since Pri-Har was not even attempting to obtain financing from Dresdner Bank. *See, e.g., Ratzlaf v. United States*, —— U.S. ——, 54 CrL 2048 (January 11,

1994) (to prove "willfulness" in currency reporting case, government must show defendant acted with knowledge his structuring activity was unlawful, not just that his purpose was to circumvent bank's reporting requirement).

POINT TWO

THE COURT MUST ENTER A JUDGMENT OF ACQUITTAL ON COUNTS ONE THROUGH NINE OF THE INDICTMENT REGARDING THE SO-CALLED "USDA FRAUD" BECAUSE THE GOVERNMENT DID NOT PROVE THAT MR. PRI-HAR INTENDED NOR CONTEMPLATED ANY HARM NOR INJURY TO THE FEDERAL GOVERNMENT, NOR DID IT INTRODUCE SUFFICIENT EVIDENCE FROM WHICH THE JURY COULD INFER PRI-HAR'S KNOWLEDGE OF A FRAUDULENT SCHEME AND HIS WILLFUL PARTICIPATION WITH AN INTENT THAT ITS ILLICIT OBJECTIVES BE ACHIEVED

Count One of the Indictment alleges that Mr. Pri-Har conspired to violate the wire fraud statute, 18 U.S.C. §§ 1343, by making statements relating to applications for grain subsidies with the Export Enhancement Program ("EEP"), as administered by the Commodity Credit Corporation ("CCC"), "knowing them to be false for the purpose of influencing the action of the CCC, and for the purpose of obtaining for himself and others money, property, and a thing of value, to wit, in excess of $4 million, under the Agricultural Trade act of 1978 . . . ." Count One further alleges that Pri-Har, or others at his direction, misrepresented that: (a) Red Rock Commodities (RRC) was unaffiliated with Olges, Inc., when Pri-Har knew he controlled the operations of RRC and Olges; (b) RRC was selling barley to Olges, when Pri-Har knew no such sales were taking place; and (c) RRC was exporting barley to Israel at a specified price accept-

able to the USDA, when Pri-Har knew that RRC was exporting the barley to Israel at a much lower price (Count One). Counts Two through Nine of the indictment allege that Pri-Har, or others at his direction, knowingly made false statements for the purpose of influencing the action of the CCC, and to obtain monies from grain subsidies totalling $4 million dollars, through the submission of eight (8) applications for subsidies via fax communications on October 22, 1991; October 22, 1991; October 31, 1991; February 10, 1992; February 12, 1992; March 26, 1992; April 8, 1992; and April 8, 1992 (Counts Two through Nine, respectively). Specifically, the indictment alleges that the applications falsely represented, ". . . the identity of the barley purchaser, the relationship between RRC and the claimed barley purchaser, and the prices at which the barley was sold . . . ."

A. The Evidence Did Not Support A Finding Of Fraudulent Intent By Pri-Har To Cause Harm To The Federal Government

The evidence did not support a finding by the jury that Mr. Pri-Har intended or contemplated any harm to the federal government resulting from the allegedly deceitful representations included in the grain subsidy applications. *United States v. Regent Office Supply Co.*, 421 F.2d at 1181; *United States v. Starr*, 816 F.2d at 98.[3]

Robert Riemenschneider, a USDA official, testified that the purpose of the Export Enhancement Program (EEP) was to assist American farmers in agricultural sales in the world market by providing subsidies to exporters of American agricultural products (T. 117).

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[3] Again, even if the evidence warranted a finding that the subsidy applications contained false statements, this alone would not support the convictions. "Misrepresentations amounting only to a deceit are insufficient to maintain a male or wire fraud prosecution. *Instead, the deceit must be coupled with a contemplated harm to the victim.*" *United States v. Starr*, 816 F.2d at 98 (emphasis added).

According to Riemenschneider, the benefits of the program ultimately accrued to the American farmers by making them more competitive in the world market and by enabling exporters to pay them a higher price (T. 129).

While it is true RRC applied for and received eight (8) government subsidies, it is equally true that RRC purchased, exported and sold American grains to eligible countries for each and every subsidy it received (Testimony of Lawrence McElvain, T. 1563-1565). In this regard, Lawrence McElvain of the USDA informed federal agents that it would be difficult to show "harm" to the program since the grain commodities were unquestionably exported (T. 1629-1630).[4] Underscoring this lack of harm was the USDA's decision to refrain from taking any administrative action against Red Rock—such as recovery of the bonuses—regarding RRC's subsidy applications (T. 1603).

Notwithstanding the above, the Government undoubtedly will argue that the USDA nonetheless paid subsidy monies to RRC under the subsidy program. The undisputed evidence indicates, however, not only that the subsidy money was "recirculated" to the American farmer (Fattal Testimony, T. 270), but in fact, that RRC paid the American farmers "up front" for the inflated price of the commodities—*including the amount of the government subsidy ultimately awarded*—and that it was not until weeks or even months later that the USDA would pay the subsidy bonus, thereby *reimbursing* RRC for monies already advanced (Fattal Testimony, T. 272; *also see* Harry Dublinsky Testimony, pp. 2329-2330). Indeed, McElvain confirmed that payment of the subsidies was not made until after the submission of arrival docu-

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[4] In a related vein, McElvain testified the USDA did not care what happened to the commodity once it was in the hands of the foreign buyer—in this case, Olges—even if Olges resold the commodity, since the USDA did not have a contract with the buyer (T. 1604-1605).

ments, including the ocean bill of lading, verifying the shipment and sale of American commodities in Israel to Israeli buyers (T. 1568-1569).

On this record, therefore, the jury was not warranted in concluding that Pri-Har contemplated any actual injury or harm to the federal government resulting from the submission of the subsidy applications.

B. The Evidence Did Not Demonstrate Mr. Pri-Har's Knowledge Of A Fraudulent Scheme Nor His Willful Participation With The Intent That Its Objectives Be Achieved

The evidence must indicate that the defendant, "had knowledge of the fraudulent nature of the . . . [scheme] . . . and wilfully participated in the scheme with the intent that its illicit objectives be achieved." *United States v. Pearlstein*, 576 F.2d 531, 541 (3d. Cir. 1978). *See United States v. Docherty*, 468 F.2d 989 (2d Cir. 1972).

Here, the trial record is devoid of evidence from which the jury could infer Mr. Pri-Har had knowledge it was a violation of the EEP regulations to utilize an "affiliate" or "subsidiary" as a buyer in subsidy applications, much less that the subsidy applications contained false statements concerning Red Rock's affiliation and sales with Olges.

The undisputed evidence indicates that Pri-Har did not read the EEP regulations, did not know its specific requirements, and possessed only a general knowledge of the program's existence (Fattal Testimony, T. 258-259, 909-910, 943-944).[5] In particular, there was no evidence presented that Pri-Har was informed it was a violation

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[5] Indeed, Norman White testified that Mike Laserson, who was in charge of trading at RRC and upon whom Pri-Har relied, said that Pri-Har did not know the EEP's rules and regulations (T. 3407).

of EEP regulations to sell to a foregin buyer who was a subsidiary or affiliate, or that the EEP regulations adopted a "minimum price" at which the grain had to be sold to the foreign buyer. Nor can knowledge of the EEP requirements be imputed to Pri-Har since the EEP regulations do not include a definition of "affiliate" or "subsidiary" in the EEP regulations, nor do they refer to the "minimum acceptable price" which is used by the USDA to decide whether or not to accept or reject a bid. Nor was there proof that Red Rock's control of Olges necessarily made Olges an "affiliate" or "subsidiary" under the EEP's regulations, much less that Pri-Har was aware of such a prohibition.

The evidence also revealed that Pri-Har was unfamiliar with the details of Red Rock's subsidy applications, since the preparation of such applications was the responsibility of Barry Rosenblum, along with Mike Laserson and Richardson Smith, who both assisted Rosenblum in preparing the bids (T. 261-265).[6]

That Pri-Har and other Red Rock employees were unaware of the EEP's regulations, including its bar on foreign affiliates, is made all the more clear from Red Rock's submitting to the USDA the arrival certificates, which clearly referred to Olges as receiving commodities on behalf of various customers (Exhs. Ai-1 through Ai-9), and the bills of lading, which listed the names of customers other than Olges as buyers (Exhs. A1 through A-3; *see also* McElvain Testimony, T. 1570-1576). Moreover, in a telephone conversation occurring in November, 1992, Richardson Smith told McElvain that Olges was Red Rock's "agent" in Israel (McElvain Testimony, T. 1596-97, 1607). Further, following the USDA's letter to Red Rock dated October 30, 1992, which included a definition of an "affiliated" company, Red Rock

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[6] Indeed, in a telephone conversation occurring on October 20, 1992, Pri-Har informed McElvain he was unfamiliar with Red Rock subsidy documents (McElvain Testimony, T. 1556).

refrained from submitting any further subsidy applications (T. 1591-1592).[7]

Lastly, Pri-Har's alleged co-conspirator, Isaac Fattal, himself testified that he was unaware his conduct regarding the USDA subsidies was criminal in nature at the time the alleged offense was committed (T. 902). Even if the evidence indicated that Fattal and Pri-Har knew they were violating requirements of the EEP program, this proof alone would not establish that Pri-Har was aware of the criminal nature of his conduct or that he acted "wilfully" to defraud the federal government through submission of the subsidy applications. *Ratzlaf v. United States*, 54 CrL at 2048 (to prove "willfulness" government must show defendant acted with knowledge his conduct was unlawful, not just that his purpose was to circumvent regulatory requirements).

POINT THREE

THE COURT MUST ENTER A JUDGMENT OF ACQUITTAL ON COUNTS TEN THROUGH TWELVE OF THE INDICTMENT REGARDING THE SO-CALLED "WHEAT FRAUD", BECAUSE THERE WAS INSUFFICIENT, CREDIBLE EVIDENCE FROM WHICH TO INFER THAT PRI-HAR MADE FALSE STATEMENTS OR MISREPRESENTATIONS OF A MATERIAL NATURE TO OBTAIN FINANCING FROM THE BANKS, NOR DID THE GOVERNMENT PROVE THE EXISTENCE OF A FRAUDULENT SCHEME WHICH WAS CAPABLE OF DECEIVING A PERSON OF ORDINARY PRUDENCE AND COMPREHENSION

Counts Ten through Twelve of the indictment allege that Pri-Har conspired and did in fact violate the bank

[7] Also, Barry Rosenblum, who was familiar with the EEP program, and upon whom Pri-Har relied, thought it was *legal* to submit subsidy bids that were higher than the actual sales price of the commodity (Testimony of Richardson Smith, T. 1479-1480).

fraud statute, 18 U.S.C. § 1344, by wilfully participating in a scheme to obtain loan money from the Standard Chartered Bank—New York Branch ("Standard Chartered") in the amount of $11,988,000.00 (Count Eleven), and from the Banque National de Paris—New York Branch ("BNP"), in the amount of $2,000,000.00 (Count Twelve). The indictment alleges that Pri-Har made material false statements by significantly overstating the purchase price of wheat from the Israeli farmers under the Israeli Emergency Wheat Program. The indictment alleges that in June and July of 1982, Pri-Har did in fact obtain loans totalling in excess of $35 million dollars from Standard Chartered, BNP-New York, BNP-Geneva, Dresdner Bank, and United Overseas Bank ("Financing Banks"), and that in each case the Financing Banks were to receive a security interest in the wheat purchased with each bank's respective financing. The indictment further alleges that Pri-Har conspired to violate the wire fraud statute, 18 U.S.C. §§ 1343, by transmitting or causing to be transmitted by mail or wire communications, false documents entitled "Certificates of Price", which significantly overstated the purchase price of the wheat, to the Union Bank of Israel ("Union Bank"), a trustee bank acting on behalf of the financing banks, which enabled Red Rock's agent in Israeli, Olges, Ltd., to in turn draw down on funds provided by the financing banks.[8]

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[8] Counts Ten through Twelve further allege that Mr. Pri-Har materially misrepresented the financial status of RRC by submitting financial statements containing false statements. We collectively discuss the sufficiency of evidence regarding the submission of false financial statements, alleged in various counts of the indictment, in Point VII, *infra*.

A. There Was Insufficient, Credible Evidence From Which To Infer That Pri-Har Knowingly Made False Statements Or Misrepresentations of A Material Nature To Obtain Financing For The Wheat Program

To maintain a conviction for bank fraud, the evidence must indicate that Mr. Pri-Har, "participated in a scheme to obtain money under custody or control of a federally chartered or insured financial institution *by means of material, false statements or representations.*" *Drexel Burnham Lambert v. Saxony Heights Realty*, 777 F. Supp. 228, 239 (S.D.N.Y. 1991), citing *United States v. St. Cloud*, 872 F.2d 846, 850 n. 4 (9th Cir. 1989) (emphasis added).

Here, the Government introduced evidence that Pri-Har orally represented to the banks that they would be financing Olges' price of the wheat from the Israeli farmers, which Pri-Har misrepresented to be $254.35 per metric ton, when the actual purchase price of the wheat was much lower, comprised of a base price of $166.00, plus the 18% value added tax (VAT) of $29.88,[9] plus $8.00 in transportation costs, for a total of approximately $203.88 (Fattal Testimony, T. 669-671, 990, 1010; Craig Tashjian Testimony, T. 1675, 1681-1683, 1816, 1847-1848; Dublinsky Testimony, T. 2530-2532; Delezenski Testimony, T. 2655, 2661).

However, the undisputed evidence at trial utterly belied the Government's position, because the testimony of bank officials and the respective loan agreements concededly indicated that the various banks approved financing *based upon the Red Rock/Olges contract (Exhibit 400), not the Ogles/Israeli farmers contract which included a pricing formula for the purchase price of the wheat* (Fattal Testimony, T. 812; Tashjian Testimony, T. 1664, 1675;

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[9] Fattal testified the prosecutor told him to calculate the purchase price *without* including the 18% VAT tax (T. 1010).

Delezenski Testimony, T. 2652-2655, 2680). The Red Rock/Olges contract provided in paragraph 4 that Olges would "set the price of the wheat to be financed by Red Rock as per the price of U.S. wheat delivered and nationalized in Israel, as specified in Appendix A." (Exhibit 400; Fattal Testimony, T. 994, 1001-1002; Delezenski Testimony, T. 2653). Appendix A, in turn, contained a formula for determining the price of wheat of "KC [comparative Kansas City futures wheat price] + $92 [delivery and nationalization costs] (Exhibit 400; Delezenski Testimony, T. 2652-2655, 2683-2686). Most important, *neither the Red Rock/Olges agreement nor the Certificates of Price, which were submitted in order to obtain the financing and to receive payment, stated that the formula in Appendix A constituted the price that Olges paid to the Israeli farmers—a fact which Dieter Wirschky of Dresdner Bank candidly admitted at trial* (Exhibits 400, 432 and 433; Wirschky Testimony, T. 2237-2238).[10]

Indeed, the language of the respective bank loan agreements, which expressly incorporated the Red Rock/Olges contract, barred any reliance on purported oral representations as a matter of law. For example, the Standard Chartered/Red Rock/Olges loan agreement, which was signed by Tashjian and prepared by Standard Chartered's bank attorney (Defense Exhibit AV; T. 1749-1750), provided in Section 8 that any modification of the agreement must be in writing:

> SECTION 8. *Modification of Agreement.* No modification or waiver of any provision of this Agreement or consent to any departure by the Com-

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[10] Indeed, the various Certificates of Price simply stated, in pertinent part, "This will confirm that this certificate of price was duly executed pursuant to the *Olges-Red Rock Israeli emergency wheat reserves financing and security agreement*" (emphasis added) (Exhibits 400, 406D, 432 and 433; Tashjian Testimony, T. 1680; Delezenski Testimony, T. 2694).

> pany or Olges therefrom shall in any event be effective *unless the same shall be in writing and signed by the Bank and the Company and Olges* and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given . . . .

(Emphasis added).

Further, the agreement also contained a standard merger/integration clause in Section 15:

> SECTION 15. *Counterparts; Entire Agreement.* . . . This Agreement, together with the other Credit Documents, and other security agreements previously delivered to the Bank by Olges or the Company and obligations of the Company or under any credit application to the Bank *embodies the entire agreement between the parties as to the subject matter hereof and supersedes all prior understandings and agreements relating to the subject matter hereof and thereof* . . . .

(Emphasis added). Both the Second Circuit and the Court of Appeals for the State of New York [11] have recognized that specific contract clauses like this one, disclaiming reliance upon oral representations not embodied in the contract, prevent a party from maintaining a fraud claim based on reliance upon a contrary oral representation. *Gruman Allied Industries, Inc. v. Rohr*, 748 F.2d 729 (2d Cir. 1984) (disclaimer clause of purchase agreement relating to design and testing of prototype bus, which disclaimed reliance upon oral representations, precluded action for fraud and misrepresentation despite allegation that defendant failed to disclose material facts concerning testing of bus); *Dannan Realty Corp. v. Harris*, 5

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[11] Section 18 of the Standard Chartered/Red Rock/Olges agreement provided that: "This agreement shall be governed by, and construed in accordance with, the laws of the State of New York" (Defense Exhibit AV).

N.Y. 2d 317 (1959) (disclaimer provisions of purchase agreement relating to sale of a building, which stated that seller had not made any representations as to the physical condition or other matters pertaining to the premises, barred buyer's action for fraud and misrepresentation despite allegation that defendant orally misrepresented operating expenses and profits of building).

That the banks approved the financing based upon the Red Rock-Olges contract, and *not* some contrary oral representation regarding the purchase price of the wheat, is made crystal clear from each bank's not requiring the production of the Olges/farmers contract before approving the financing. Although Craig Tashjian of Standard Chartered and Sharon Delezenski of BNP testified they each required the Olges/farmers contract—which Pri-Har and Fattal told them was lengthy and in Hebrew—they decided to proceed with financing even though they never received the document (Tashjian Testimony, T. 1679, 1834-1835, 1858; Delezenski Testimony, T. 2662). In this regard, Tashjian testified he simply did not ask Standard Chartered's local counsel in Israeli to obtain a copy of the Olges/farmers contract, even though Tashjian considered it a "critical" document (T. 1834-1835).[12] Quite simply, it strains credulity that Standard Chartered and

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[12] According to Tashjian the Olges/Israeli farmers contract was supposed to be attached to the Red Rock/Ogles/Standard Chartered, but it was not (T. 1751-1753). Tashjian testified that a Standard Chartered bank attorney requested, by letter to Red Rock, a copy of the Olges/farmers contract, but the contract was never received (T. 1751-1753). Tashjian also testified that various internal bank memoranda confirmed it was his belief that the formula in Appendix A of the Red Rock/Olges contract represented the price that Olges was going to pay to the Israeli farmers (T. 1830). The credibility of Tashjian's testimony was seriously undercut, however, because the Government was unable to produce any of the above-stated documents to corroborate Tashjian's testimony—even though all of Standard Chartered's files, which presumably would have contained such documents, had been subpoenaed for trial (T. 1751-1753, 1828-1330, 1855-1856).

BNP would have approved loans for Red Rock in such large sums, $11,988,000.00 and 2,000,000.00, respectively, without first obtaining the Olges/farmers contract if, as testified to by Tashjian and Delezenski, the banks truly believed they were financing the purchase price of the wheat. Surely, if this were the case, the banks would have *required* the production of the Olges/farmers contract before approving the financing. On the other hand, if the banks approved the financing based upon the Red Rock/Olges contract, as Pri-Har maintained, there would have been no need for the banks to require production of the Olges/farmers contract—which, in fact, they did not.[13]

Nor could bank officials satisfactorily explain the basis for their belief that the Appendix A formula, "KC + $92"—which included various delivery and nationalization costs for the wheat as if it were delivered to Israel from the United States—could possibly refer to the purchase price that Olges, an Israeli corporation, paid to

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[13] In any event, the purchase price of the wheat was calculated under a formula in the Olges/farmers contract which was substantially the same as the pricing formula set forth in Appendix A to the Red Rock/Olges contract financed by the banks. For instance, the Red Rock/Olges contract was based upon a Kansas City futures price plus a set figure of $92.00, comprised of various component costs, including FOB costs, shipping, maritime insurance, port charges, duties, and transportation, all of which were described in a sample pricing document which Red Rock provided with its loan application (Exhibits 400 and 418A; Delezenski Testimony, T. 2684). The pricing formula for the Olges/farmers contract was virtually identical to the Red Rock/Olges formula, since it, too, was based upon a Kansas City futures price, plus virtually identical component costs—except for an added $10.00 cost which represented the profit to Olges (Exhibit 403). Although it is true the total of the added component costs in the Olges/farmers contract was not a set price of $92.00, like in the Red Rock/Olges contract, the fixed-price feature of Red Rock loan agreement was one of which the banks approved since Red Rock was responsible for any component costs above the set price of $92.00 (Delezenski Testimony, T. 2693).

Israeli farmers for their wheat (*see, e.g.,* Delezenski Testimony, T. 2684-2686, 2693-2696).[14]

On this record, therefore, no reasonable juror could conclude that Pri-Har knowingly and wilfully made false statements of a material nature to obtain financing for the wheat program. The witness testimony and the loan agreements convincingly establish that the banks were informed they were extending financing based upon the Red Rock/Olges contract, *not* the purchase price of the wheat paid by Olges to the Israeli farmers. *Ratzlaf v. United States, supra.*

B. The Evidence Did Not Establish A Fraudulent Scheme Reasonably Calculated To Deceive Persons Of Ordinary Prudence and Comprehension

Nor did the Government's evidence establish a fraudulent scheme "reasonably calculated" to deceive persons of "ordinary prudence and comprehension." *Kehr Packages, Inc. v. Fidelcor, Inc.,* 926 F.2d at 1415; *Regent Office Supply Co.,* 421 F.2d at 1181.

Assuming that Pri-Har misrepresented to bank officials that they were financing the purchase price of the wheat, as testified to by Craig Tashjian and Sharon Delezenski, *no* reasonable person of ordinary prudence and comprehension would have lent such large sums of money—$11,988,000.00 by Standard Chartered Bank and 2,000,000.00 by BNP—based upon mere oral representations without first obtaining the Olges/farmers contract or some other corroborating proof of the purchase price. This is particularly true since the bank loan agreement with Standard Chartered included a merger/integration clause which disclaimed reliance upon contrary oral representations. Nor was there any proof that the Olges/farmers

[14] The Olges/farmers pricing formula was based upon a formula established by the Israeli government, which was included in the Israeli Government/Olges contract under the Emergency Wheat Program (Defense Exhibit AN; Dublinsky Testimony T. 2521).

contract was not readily available to the banks. Rather, Craig Tashjian was forced to concede *he simply did not request* that the bank's local counsel to Israeli obtain the Olges/farmers contract (T. 1833-1834).

On this record, therefore, the evidence was insufficient for a reasonable juror to conclude that there existed a fraudulent scheme with a capacity to defraud persons of "ordinary prudence and comprehension." *Regent Office Supply Co.*, 421 F.2d at 1181.

POINT FOUR

THE COURT MUST ENTER A JUDGMENT OF ACQUITTAL ON COUNTS EIGHTEEN AND NINETEEN OF THE INDICTMENT REGARDING THE SO-CALLED "BNP MARGIN LOAN FRAUD" BECAUSE THERE WAS INSUFFICIENT EVIDENCE FROM WHICH THE JURY COULD CONCLUDE THAT MR. PRI-HAR KNOWINGLY PARTICIPATED IN A FRAUDULENT SCHEME TO DEFRAUD THE BANK BY MAKING FALSE STATEMENTS OR MISREPRESENTATIONS OF A MATERIAL NATURE. TO THE CONTRARY, PRI-HAR FULLY DESCRIBED THE PURPOSE OF HIS LOAN REQUEST AND WHAT THE BANK FINANCING WOULD BE USED FOR.

Counts Eighteen and Nineteen of the indictment allege that Mr. Pri-Har conspired and did in fact violate the bank fraud statute, 18 U.S.C. § 1344, by wilfully participating in a scheme to obtain moneys of the Banque National de Paris—New York Branch ("BNP"). In particular, the indictment alleges, among other things, that: (a) Pri-Har falsely represented that the loan money would be used to purchase futures contracts in connection with underlying commodities shipments when, in fact, he knew the money would be used for other purposes; and, (b) Pri-Har induced BNP to extend the loan by falsely repre-

senting the loan money had been used to purchase futures contracts when, in fact, he knew the money had been used for other purposes (Counts Eighteen and Nineteen).[15]

A. The Evidence Did Not Demonstrate That Mr. Pri-Har Knowingly Defrauded BNP Bank By Making Material False Statements Or Misrepresentations In Support Of The Loan Application

As stated previously, in order to maintain a conviction for bank fraud, the evidence must indicate that Mr. Pri-Har, "participated in a scheme to obtain money under custody or control of a federally chartered or insured financial institution *by means of material, false statements or representations.*" *Drexel Burnham Lambert v. Saxony Heights Realty*, 777 F.Supp. at 239, citing *United States v. St. Cloud*, 872 F.2d at 850 n. 4 (emphasis added).

Here, the undisputed evidence belied the Government's contention that Mr. Pri-Har misrepresented that the 1.5 million dollars in loan money from BNP-New York would be used to purchase futures contracts in connection with underlying commodities shipments financed by BNP[16], when in fact, the loan money was used for various other purposes, such as payroll, operational expenses, and the

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[15] Counts Eighteen and Nineteen further allege that Pri-Har materially misrepresented the financial status of RRC by submitting financial statements containing false statements. As stated previously, we collectively discuss the sufficiency of evidence regarding the submission of false financial statements, alleged in the various counts of the indictment, in Point VII, *infra*.

[16] According to Barry Feigenbaum, the BNP bank officer, since the financing of futures contracts was unsecured, paragraph 2(d) of the loan agreement with Red Rock required that its financing of futures be directly related to the export of underlying commodities financed by BNP (Feigenbaum Testimony, T. 2766, 2818). Feigenbaum further testified he orally advised Pri-Har that BNP would only provide margin financing for commodities transactions that BNP was financing (T. 2819).

repayment of other unrelated loans (Fattal Testimony, T. 528-540; *see also* Testimony of Charles O'Donnell of Prudential Securities, T. 2967-2972).

First, Feigenbaum candidly admitted that Pri-Har told him he already had expended his own money for margin financing and was using BNP's money *to reimburse Red Rock* for margin already expended (T. 2889). Thus, the evidence does not indicate that Pri-Har misrepresented that BNP's funds would be used only for margin financing, rather than to reimburse Red Rock for its own costs in light of substantial monies already expended on margin calls.[17]

Second, the loan agreement between Red Rock and BNP did not require, as alleged in the indictment, that the financing be used only for the purchase of *futures contracts* in connection with underlying commodities shipments. Rather, paragraph 2.C.111 of the agreement states the financing was for Red Rock's margin *requirements*, a reference to Red Rock's *margin calls*, which were comprised not only of its buying and selling of futures contracts, but also, its overall daily positioning and trading activity, including the buying and selling of options, futures, comomdities, and cash transactions (Government Exhibit 300; Fattal Testimony T. 1194, Feigenbaum Testimony, T. 2893-2894). Indeed, when pressed on cross-examination, Barry Feigenbaum conceded he was aware that BNP's financing would go to Red Rock's overall positioning, although he stated that BNP's money would then be assigned to specific underlying contracts (T. 2894).

Third, the evidence indisputably shows that BNP *waived* any requirement that margin financing be assigned to specific underlying contracts for commodities transac-

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[17] Defense Exhibit BA, prepared by Charles O'Donnell, of Prudential Securities, Red Rock's brokerage firm, indicated that Red Rock's margin calls from July, 1991 through August, 1992, were substantial, totalling approximately $18 million dollars (Exhibit BA).

tions that it financed. Red Rock's initial credit facility with BNP was 10 million dollars, of which 1.5 million was allotted for the futures margin financing (T. 2849). BNP first approved margin loan financing for Red Rock in the amount of 1 million dollars on February 13, 1992, and in the amount of $500,000.00, on February 26, 1992 (T. 2819, 2824). Then, in March, 1992, BNP approved two loan requests by Red Rock totalling 7.7 million dollars for RAM steel financing—which did not mature until August and September, 1992—and an additional $500,000.00 in financing for a performance bond with the USDA (T. 2849-2850; 2882-2889). As of the beginning of March, therefore, there was only $300,000.00 available in Red Rock's credit facility with BNP for financing underlying commodities transactions (T. 2887). Feigenbaum admitted this was not "a lot of availability" under the credit line, and certainly not enough to finance commodities transactions corresponding to $1.5 million dollars in margin financing (T. 2889).

Feigenbaum concededly testified that in April, 1992, 1.1 million dollars was repaid on the steel financing, leaving approximately 1.5 million dollars available on Red Rock's credit facility (T. 2915). Nevertheless, according to the Government's own evidence, Red Rock's application for margin financing related to three underlying soybean shipments in March, April, and May, 1992 (the May shipment was later changed to June of 1992), which by the Government's own calculation would require approximately *$6.25 million dollars in financing for each soybean shipment, for a total of $18,750,000.00,* as reflected in the Government chart introduced as Exhibit 304 ($250.00 per metric/ton $\times$ 25,000 tons = 6.25 million dollars) (Feigenbaum Testimony, T. 2821). It is undisputed that Red Rock *never* had available this amount of credit with BNP—either at the time of the original loan application or the requests for extensions—especially in the wake of BNP's approval of 7.7 million dollars in steel financing,

which loans did not mature until August and September, 1992.

Indeed, by letter dated June 22, 1992, Pri-Har notified Feigenbaum of this problem, indicating that Red Rock did not have sufficient credit available with BNP to finance the underlying commodities transactions until the outstanding steel loan was paid down (T. 2909-2910).

Finally, lest there be any question that BNP waived its requirement that margin financing be tied to underlying commodities transactions, Feigenbaum testified he was not bothered that Pri-Har only had $300,000 available on his credit facility to finance commodities transactions because "*he had lines with lots of banks. He had availability of (sic.) other places*" (T. 2912) (emphasis added). Obviously, the "other" banks financing these commodities transactions—*not* BNP—would secure an interest in the commodities which they financed. On this evidence, alone, any reasonable juror would ultimately conclude that BNP had waived any purported requirement that its margin financing be linked to its financing of underlying commodities transactions.

In sum, the evidence was insufficient from which a reasonable jury could infer that Mr. Pri-Har knowingly and wilfully made false statements or misrepresentations to obtain the margin financing from BNP. *Ratzlaf v. United States, supra.*

POINT FIVE

THE COURT MUST ENTER A JUDGMENT OF ACQUITTAL ON COUNTS TWENTY THROUGH TWENTY-TWO OF THE INDICTMENT REGARDING THE SO-CALLED "RAM STEEL FRAUD" BECAUSE THERE WAS INSUFFICIENT EVIDENCE FROM WHICH THE JURY COULD CONCLUDE THAT MR. PRI-HAR KNOWINGLY AND WILFULLY DEFRAUDED BNP BANK AND ABN-AMRO BANK BY MAKING FALSE STATEMENTS OR MISREPRESENTATIONS OF A MATERIAL NATURE. THE EVIDENCE INDICATED ONLY THAT PRI-HAR HAD SUSPICIONS THERE WAS A PROBLEM WITH CONTROL OF THE STEEL, WHICH SERVED AS COLLATERAL FOR THE LOANS, BUT THAT PRI-HAR IN GOOD FAITH INVESTIGATED THE MATTER AND DETERMINED THE STEEL HAD NOT BEEN STOLEN AND THE BILL OF LADING STILL CONTROLLED THE STEEL.

Counts Twenty through Twenty-Two of the indictment allege that Mr. Pri-Har conspired and did in fact violate the bank fraud statute, 18 U.S.C. § 1344, by wilfully participating in a scheme to obtain in excess of $7 million dollars in loans from the BNP-New York bank (Count Twenty-One), and extensions of loans in excess of $10 million dollars with ABN-AMRO Bank (Count Twenty-Two), in March, 1992. The indictment alleges that Pri-Har represented that the loan money would be secured by certain steel billets under the control of Union Bank Trust Company Limited ("UBT"), a trustee bank in Israel, by virtue of bills of lading for the steel which UBT held, when Pri-Har knew the purchaser of the steel, Ram Metals & Building Industries, Ltd., ("RAM"), had been able to obtain possession and control of the steel billets, removing them from an Israeli port to a warehouse under Ram's

control, notwithstanding the fact that UBT had the bills of lading (Counts Twenty through Twenty-Two).[18]

A. The Evidence Did Not Demonstrate That Mr. Pri-Har Knowingly Defrauded BNP Bank By Knowingly and Wilfully Making False Statements In Support of The Loan Applications And/Or Extensions

As stated previously, in order to maintain the convictions for bank fraud in these counts, the evidence must indicate that Mr. Pri-Har, "participated in a scheme to obtain money under custody or control of a federally chartered or insured financial institution *by means of material, false statements or representations.*" *Drexel Burnham Lambert v. Saxony Heights Realty,* 777 F.Supp. at 239.

In this case, although the Government's evidence concededly indicated that Pri-Har had suspicions there was a problem with control of the steel before obtaining the financing, the evidence also demonstrated that Pri-Har acted in good faith and without guilty knowledge since he conducted an investigation and determining that the steel had *not* been stolen and that the bills of lading still controlled the steel.

In November, 1991, Red Rock received a letter from UBT, the trustee bank in Israel, indicating the steel billets were stored in a private bonded warehouse in the name of the importer, RAM Metals, instead of a port facility under customs control as provided in the Red Rock-UBT trust agreement (Government Exhibit 201; T. 401, 405-406).[19]

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[18] Counts Twenty-Four through Twenty-Six further allege that Mr. Pri-Har materially misrepresented the financial status of RRC by submitting financial statements that contained false statements. As indicated previously, we collectively discuss the sufficiency of evidence regarding the submission of false financial statements alleged in various counts of the indictment in Point VII, *infra.*

[19] Under the trust agreement, the shipments of steel were supposed to go to the Israeli port where they would be stored under

The UBT letter indicated, however, that even though the storage facility was outside the port, the bills of lading still controlled the steel because the steel was in a bonded warehouse (T. 407-408). Fattal testified that a bonded warehouse, even though not in the port, was still under customs jurisdiction, so that the release of the steel billets would still require presentation of the bill of lading which UBT held (T. 414-416). Fattal conceded, therefore, that the UBT letter indicated the title documents still controlled the steel and its release from the private bonded warehouse (T. 416).

To confirm that the bill of lading still controlled the steel, Pri-Har sought and obtained an opinion letter from a law firm in Israel, M. Seligman & Co., which indicated, among other things, that Red Rock retained title to the steel as long as UBT held the bill of lading, and that Red Rock would be able to regain possession of the goods and remove them from the warehouse "at will" (Defense Exhibit "J"). On December 23, 1991, Fattal forwarded a copy of this letter to Barry Feigenbaum, the bank official at BNP considering the loan request (T. 1061, Defense Exhibit J).

In early January, 1992, Pri-Har heard reports from Jules Grunbaum, a wheat customer whose office overlooked the bonded warehouse where the steel billets were stored, that some of the steel must be missing because there was a very small quantity of steel in the warehouse (T. 408-411). Fattal testified that Pri-Har did not believe Grunbaum, however, because Grunbaum had a "vested

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control of customs officials, who would not release the steel without presentation of the bill of lading, which UBT kept until paid by RAM (T. 396-398). According to Isaac Fattal, RAM somehow convinced shipping agents to discharge the cargos of steel into private bonded warehouses, rather than port facilities, on the strength of RAM's personal guarantee that it would produce ownership documents at the time the steel was to be released from the warehouses (T. 413).

interest" in having the steel moved and stored in his own warehouse (T. 410, 1057-1508).

Pri-Har learned through subsequent correspondence and telephone conversations with Yigal Shapira, a UBT official who was concerned about its control of the steel, that the steel was stored at Ets-Yarok warehouse, a bonded warehouse (T. 435, 450; Defense Exhibit "BH"). According to Fattal, Pri-Har sent Barry Rosenblum to Israel to confirm that the steel was in storage in this warehouse and was not stolen (T. 1072-1073). Fattal testified he remembered seeing photographs of the steel sometime after January, 1992, although he did not specifically recall if the photos were taken by Rosenblum (T. 1076). Danny Avraham testified that he, too, inspected the steel at the Etz-Yarok warehouse at the end of February or beginning of March, 1992 (T. 3710-3712).

Barry Feigenbaum, of BNP, and Paul Feldman, of ABN-AMRO, each concededly testified that Pri-Har told them the steel was stored in port warehouses under customs control and that the steel was controlled by the bill of lading held by UBT (Feldman Testimony, T. 1908-1909, 1916, 1934; Feigenbaum Testimony, T. 2736-2738).[20] Nevertheless, *Fattal conceded it was his and Pri-Har's "understanding" that release of the steel billets would still require the presentation of the bill of lading, which UBT held, as long as the steel was in a bonded warehouse—whether in or out of port* (T. 1043-1045, 1051). Fattal testified it was his and Pri-Har's belief that a bonded warehouse was one still under customs control, which meant the steel would not be released without clearance from customs officials who required the presentation of the bill of lading which UBT possessed (T. 431, 1042-1045, 1051). Further the Ets-Yarok warehouse was within the port vicinity, only about one mile away (Avraham Testimony, T. 3709).

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[20] Feldman conceded, however, that an internal bank memorandum of ABN-AMRO simply stated that the steel was stored in a bonded warehouse (T. 2029).

In any event, Feigenbaum, himself, spoke with Yigal Shapira of UBT by telephone on February 13, 1992 (T. 2875). Shapira told Feigenbaum that he held the title documents to the steel billets, which were held in RAM's name in a warehouse, and that any release had to be cleared through customs (T. 2876). Shapira also told Feigenbaum he did not have physical possession of the steel, and that he (Shapira) was not as comfortable with the warehousing of steel as he was with the storage of grains because his bank had control of a warehouse which was used for grains (T. 2879-2880). Even after Shapira articulated these concerns, Feigenbaum decided to proceed with the loan.

Finally, Fattal conceded that he and Pri-Har did not learn the steel was actually stolen until August, 1992—long after the financing had been approved—when they were informed of the theft by Yoav Peled of Ram Metals (T. 1079-1080, 1202-1204). At this point, Pri-Har decided to tell both BNP and ABN-AMRO (T. 471-472).[21]

On this record, therefore, there was insufficient evidence from which the jury could infer that Mr. Pri-Har participated in a fraudulent scheme to defraud BNP Bank and ABN-AMRO Bank, by knowingly and wilfully making false statements of a material nature in an effort to obtain the steel financing. To the contrary, the evidence demonstrated that Pri-Har acted in good faith and without a culpable mental state since he investigated and dispelled any suspicions that the steel had been stolen, or that the bills of lading no longer controlled the steel. *Ratzlaf v. United States, supra.*

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[21] Indeed, in a telephone conversation with Norman White on November 3, 1992, Fattal told White that their suspicions about the theft of the steel did not come about until July 30, 1992 (T. 1202). Also, it was apparent from a telephone conversation between Pri-Har and Rubi Asa that Pri-Har did not know about the theft of the steel until August, 1992 (Defense Exhibit L-42).

POINT SIX

THE COURT MUST ENTER A JUDGMENT OF ACQUITTAL ON COUNT TWENTY-THREE OF THE INDICTMENT REGARDING THE SO-CALLED "CITIBANK FRAUD" AND COUNT TWENTY-FOUR REGARDING THE SO-CALLED "BANK OF TOKYO FRAUD" BECAUSE THE EVIDENCE WAS INSUFFICIENT FROM WHICH THE JURY COULD INFER THAT PRI-HAR MADE FALSE STATEMENTS OF A MATERIAL NATURE IN APPLYING FOR THE LOANS, NOR DID THE EVIDENCE ESTABLISH THAT PRI-HAR KNOWINGLY AND WILFULLY DEFRAUDED THE BANKS TO OBTAIN THE CITIBANK AND BANK OF TOKYO LOANS.

Count Twenty-Three of the indictment alleges that Mr. Pri-Har, in support of an application with Citibank, N.A., for a $1-million dollar line of credit, submitted a financial statement which falsely represented that Pri-Har owned certain properties which Pri-Har knew he did not own, in violation of 18 U.S.C. § 1014. Likewise, Count Twenty-Four of the indictment alleges that Pri-Har, in support of an application for a 17-million dollar loan, submitted a financial statement which falsely represented Pri-Har's ownership of certain properties which Pri-Har knew he did not own, in violation of 18 U.S.C. § 1014.

A. The Evidence Was Insufficient from Which To Infer That Mr. Pri-Har Made False Statements Of A "MATERIAL" Nature

For purposes of 18 U.S.C. § 1014, which makes it unlawful to knowingly make a false statement in a credit or loan application, the evidence must show the defendant made a false statement of a "material" nature. *United States v. Braverman*, 522 F.2d 218 (7th Cir. 1975). A statement concerns a "material" fact when it has the ca-

pacity to influence the lending institution. *United States v. Braverman*, 522 F.2d at 218; *United States v. McGee*, 831 F.2d 670, 671 (6th Cir. 1987) (same); *United States v. Ryan*, 828 F.2d 1010 (3d Cir. 1987) ("it is enough that the statement is of a type that could disturb the balance of facts that would otherwise be available to the bank"). *See also United States v. Cleary*, 565 F.2d 43 (2d Cir. 1977), *cert. denied*, 435 U.S. 915 (1978) (question of materiality is one of law to be decided by judge, not jury).

According to the Government's evidence, in applying for loans with Citibank and Bank of Tokyo, Pri-Har submitted a December 31, 1986 financial statement, introduced by the Government as Exhibit 902 (T. 3033), which included a property in the Bronx, 135-1456 Kingsbridge Road, belonging to someone else, a Alex Zaika (*see* Testimony of Alex Zaika, T. 3090-3091), and a property in Brooklyn, 1024 Seventh Avenue, which simply did not exist and, in fact, was located in a cemetery (*see* Testimony of Agent James Clemente, T. 3551-3552). According to the financial statement, the value of the Bronx property was $1.5 million dollars, while the value of the Brooklyn property was $2000.00 (*see* Exhibit 902).

Regarding the January 1987 Citibank loan for 1 million dollars,[22] any misrepresentation concerning the Bronx and Brooklyn properties, even if proved, was not of a sufficiently "material" nature to support Pri-Har's conviction as a matter of law. Diane LaBasse, the Citibank loan officer, testified she requested financial statements from Pri-Har to determine whether he had the "financial wherewithal to repay the loan", including the ability to pay back the loan from several sources (T. 3031, 3035). The listed value of the Bronx (1.5 million) and Brooklyn ($2000) properties was so minimal in relation to Pri-Har's other United States real estate listed in the financial statement—

[22] The one-million dollar loan was repaid (T. 3045).

which was indisputably legitimate—that it could not have influenced Citibank's approval of the loan. The net worth of Pri-Har's United States real estate, including the Bronx and Brooklyn properties, was 15.5 million dollars, leaving approximately 14 million dollars of legitimate real estate assets (T. 3035-3036).[23] Moreover, LaBasse conceded the Citibank loan was partially secured by a second mortgage on Florida property (T. 3044). In addition, Pri-Har had previously borrowed $200,000.00 from Citibank, and his prior credit history with that loan was good (T. 3045). Finally, Citibank's approval of the loan clearly was not influenced by Pri-Har's purported ownership of the Bronx and Brooklyn properties because Pri-Har told LaBasse they were about to be sold, and thus converted into cash which could easily be put beyond Citibank's reach in the event of collection procedures (T. 3037-3038).

Likewise, regarding the May 1988 Bank of Toyko loan for 17 million dollars, any misrepresentation concerning the Bronx and Brooklyn properties in the 1986 financial statement, even if proved, was clearly not of a sufficiently "material" nature to support Pri-Har's conviction as a matter of law. Lawrence Kneip, the Bank of Toyko loan officer, testified that Pri-Har's loan concerned the refinancing of an office property in Poughkeepsie, New York, including the pay-off of a $16-million dollar Citibank loan (T. 3053-3055). The loan was secured by a mortgage on the Poughkeepsie property, the value of which exceeded by 25% the face amount of the loan (T. 3064-3065). Again, the net worth of the Bronx ($1.5 million) and Brooklyn ($2000) properties was minimal in relation to Pri-Har's other United States real estate and other assets, which by May of 1988 had in-

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[23] Pri-Har's total net worth, including cash assets and foreign properties, was $22,166,000.00 (T. 3046; Exhibit 902). However, LaBasse testified Citibank did not place any reliance on foreign assets that Pri-Har owned in Israel (T. 3046).

creased to 40 million dollars, as reflected in the Bank of Toyko loan application which listed five other commercial properties (Defense Exhibit BB). Further, Pri-Har's 1988 loan application did not even list the Bronx and Brooklyn properties, so that Bank of Toyko could not have been deceived into thinking these properties would be available in the event Pri-Har defaulted on the loan (Defense Exhibit BB). Finally, a lengthy, detailed bank memorandum, recommending approval of the loan, did not once mention the Bronx and Brooklyn properties, thus underscoring the *lack* of any conceivable materiality of the Bronx and Brooklyn properties to approval of the Bank of Toyko loan (T. 3068; Defense Exhibit BB).

On this record, therefore, the evidence was insufficient from which to infer that misrepresentations regarding the Bronx and Brooklyn properties in the 1986 financial statement were sufficiently "material" to influence Citibank's and Bank of Toyko's loan decisions.

B. The Evidence Did Not Demonstrate Mr. Pri-Har Knowingly And Wilfully Defrauded The Banks

Evidence that Pri-Har misrepresented the ownership of certain properties on the financial statements was insufficient to establish that Pri-Har had knowledge of the unlawfulness of such conduct and that he acted wilfully to defraud the banks through the submission of the statements. *Ratzlaf v. United States*, 54 CrL at 2048 (to prove "willfulness" government must show defendant acted with knowledge his conduct was unlawful, not just that his purpose was to circumvent bank regulatory requirements).

POINT SEVEN

THE EVIDENCE DID NOT SUPPORT THE CHARGES IN VARIOUS COUNTS OF THE INDICTMENT THAT PRI-HAR CONSPIRED AND IN FACT MADE FALSE STATEMENTS OR MISREPRESENTATIONS OF A MATERIAL NATURE IN FINANCIAL STATEMENTS REGARDING THE FINANCIAL STATUS OF RRC, NOR DID THE EVIDENCE ESTABLISH THAT PRI-HAR KNOWINGLY AND WILFULLY DEFRAUDED THE BANKS REGARDING THE FINANCIAL STATUS OF RRC

Various counts of the indictment allege that Pri-Har conspired and did in fact violate the bank fraud statute, 18 U.S.C. § 1344, by materially misrepresenting the financial status of RRC, including Counts Ten through Twelve (the "Wheat Fraud"), Counts Eighteen and Nineteen ("the BNP Margin Loan Fraud"), and Counts Twenty through Twenty-Two (the "RAM Steel Fraud").

In support of these changes, the Government attempted to show that year-end financial statements of RRC for 1989, 1990, and 1991 (Exhibits 601, 602, and 603, respectively), significantly and falsely overstated the cash assets of RRC. Pri-Har supposedly orchestrated this overvaluation by obtaining at the end of each of the years short-term loans which were payable soon after the beginning of the new year (Fattal Testimony, T. 742-763).

Issac Fattal testified the 1989 financial statement falsely stated that Pri-Har, the principal shareholder of Red Rock Holdings ("RRH"), had loaned RRC $8.5 million dollars, which was listed as subordinated long-term debt and which did not mature for 5 years, even though Pri-Har had never loaned such money to RRC (Fattal Testimony, T. 739-740, 746). Fattal testified that Pri-Har made it appear as if RRH had actually lent RRC the money by aranging, on December 26, 1989, for Bank Leumi in Israeli to lend RRH the $8.5 million dollars, and then in

turn, transferring the stated sum from RRH's account in Bank Leumi to RRC's bank account in Bank Leumi (T. 742). The loan became due on January 10, 1990; also, the loan money could not be used by RRC during this two-week loan period (T. 742, 747). According to Fattal, Pri-Har indicated he wanted to be able to show $8.5 million dollars in RRC's account at the end of the year for inclusion in the financial statement (T. 746, 748). Likewise, Fattal testified the 1990 financial statement for RRC falsely reported $13,433,863.00 in cash and cash equivalents (T. 754, 762). Fattal testified that Pri-Har arranged in December, 1990, for Union Bank in Israeli to lend Golden Eagle corporation approximately $12.3 million dollars, and then in turn, he transferred the stated sum from Golden Eagle's account in Union Bank to RRC's account in Union Bank (T. 754-756). The loan was due to be paid in 30 days, and again, the loan money could not be used by RRC during the loan period (T. 756).

Robert Lynch, a certified public accountant of Arthur Andersen & Company, rendered his opinion that the financial statements were materially misstated, and that the loan transactions were "sham" transactions (T. 3108).

Each of the financial statements was prepared by an outside accountant, Shelly Ganz, who did not testify (Fattal Testimony, T. 737).

A. The Evidence Did Not Support The Conspiracy Charges

The essence of a conspiracy is an agreement between two or more persons. *United States v. Labat,* 905 F.2d 18, 21 (2d Cir. 1990). In this case, the evidence clearly did not support conspiracy charges regarding the financial statements because the Government did not present any evidence that Fattal, nor anyone else, knowingly conspired with Pri-Har and performed overt acts in furtherance of the conspiracy by assisting Pri-Har in falsifying

the financial statements. Indeed, Fattal testified that Pri-Har at one point expressly instructed him that Pri-Har, himself—not Fattal—would arrange for the submission of documentation to Mr. Ganz who prepared the financial statements (T. 753).

B. The Evidence Did Not Establish As A Matter of Law That RRC's Cash Assets Were Overstated

Nor did the Government prove that RRC's cash assets were in fact overstated in the financial statements. The statements were prepared by Shelly Ganz, who did not testify at the trial. Neither Fattal nor Robert Lynch was personally aware of the information that Ganz relied upon in preparing the financial statements. Thus, the Government did not prove that the cash assets listed in each financial statement certified by Ganz did not refer to other cash assets legitimately held by RRC, such as the cash in RRC accounts in Venezuela, as Pri-Har maintained.[24] Indeed, Lynch conceded he had analyzed only Red Rock's loan deposits in Israel, as reflected in documents provided by the Government, but he did not examine all of RRC's other bank accounts, including checking accounts, which might have established an alternative source of income for the cash assets listed in the financial statements (T. 3187). Quite simply, the Government could have called Ganz as a witness to establish which cash assets were referred to in the various financial statements, but it elected not to do so. Without such proof, the Government did not carry its burden of proving Pri-Har's guilt beyond a reasonable doubt, and the convictions cannot stand as a matter of law.

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[24] The Court excluded certificates profered by the defense confirming RRC's cash assets in Venezuela.

C. The Evidence Did Not Demonstrate That Pri-Har Knowingly and Wilfully Defrauded The Banks

As stated previously, the evidence must indicate that the defendant, "had knowledge of the fraudulent nature of the . . . [scheme] . . . and wilfully participated in the scheme with the intent that its illicit objectives be achieved." *United States v. Pearlstein*, 576 F.2d 531 at 541; *United States v. Docherty*, 468 F.2d at 989. Here, evidence that Pri-Har overstated the cash assets of RRC in various financial statements was insufficient to establish that Pri-Har had knowledge of the criminality of such conduct and that he acted wilfully to defraud the banks through the submission of the financial statements. *Ratzalj v. United States*, 54 CrL at 2048 (to prove "willfulness" government must show defendant acted with knowledge his conduct was unlawful, not just that his purpose was to circumvent bank regulatory requirements).

CONCLUSION

In light of the foregoing, the defendant respectfully requests, pursuant to Rule 29(c), Fed. R. Crim. P., that this Court enter an Order granting a judgment of acquittal on each and every count of the indictment.

Respectfully submitted,

DONALD A. HARWOOD, ESQ.
Attorney for Defendant
Menachem Pri-Har
8 West 40th Street, Suite 900
New York, New York 10018
(212) 730-2689

By: /s/ Donald A. Harwood
DONALD A. HARWOOD
(0834)

Dated: New York, New York
April 19, 1994

FATTAL: There is a file of Danny Avraham. There is a file on Golden Eagle, all the conversations. They don't have it. They don't have it, they don't have it. [UI] I am not going to get revenge on him, to [UI]

OHANA: Now, listen, you are saying the following: instead of the two of us being in the same boat,

FATTAL: Exactly, look, tomorrow I'll deal in business, I might be able to help him. But I am not going, but I have a problem. If I don't do it, I'm going in together with him. There's no point to that.

OHANA: I'll say this now. Let me [UI]

FATTAL: If, if, if, if it were, if he tell me, if he tells me, I will take care of your livelihood, I am willing to sit with him as an act of solidarity.

OHANA: That's what I am saying. That's what I

FATTAL: I am willing to sit with him.

OHANA: Really.

FATTAL: Yes. I am willing to sit with him. I am simply today, why am I doing.

UM: Just a moment, just a moment, just a moment, Isaac, now it's very important.

FATTAL: Important

OHANA: Because it's possible that I am giving you this message now.

FATTAL: All right.

OHANA: If we're talking about some sum of money like you wanted, 250 or even more, let's say, if it were obtained for you, you [UI]

FATTAL: go in with him, deny everything, take the

OHANA: Deny everything [UI]

FATTAL: Yes, yes, go in with him

OHANA: Give me a HAND.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 94-1305

UNITED STATES OF AMERICA

-against-

MENACHEM PRI-HAR,
Appellant-Defendant.

REPLY MEMORANDUM OF LAW IN SUPPORT OF APPELLANT PRI-HAR'S MOTION FOR STAY OF SENTENCE AND RELEASE ON BAIL PENDING APPEAL

PRELIMINARY STATEMENT

This Reply Memorandum of Law is respectfully submitted in response to the affirmation of Assistant United States Attorney John McCormick dated June 9, 1994, opposing appellant Pri-Har's motion for stay of sentence and release on bail pending appeal ("the McCormick Affirmation").[1]

STANDARD OF REVIEW

In its papers, the Government correctly states that the appellant shoulders the burden of demonstrating by clear and convincing evidence that he is not a risk of flight

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[1] Through inadvertence, pages 2 through 8 of Exhibit "G" to Pri-Har's motion were inserted in reverse order. The pages appear in proper sequence in Exhibit "E" to the McCormick Affirmation.

and that his appeal is not for purposes of delay and raises a substantial question of law or fact likely to result in reversal. McCormick Affirmation ¶ 20. The Government further asserts the district court's findings on these points should not be disturbed unless they are "clearly erroneous." McCormick Affirmation ¶ 21. Here, however, Judge Sprizzo did not make any written findings regarding the denial of release as required by Fed.R.App. P. 9(a), which expressly provides: ". . . the district court shall state in writing the reasons for the action taken." Indeed, Judge Sprizzo was apparently of the misimpression he did not have authority to even grant the post-trial motion for release and stay of execution of sentence since he stated in summarily denying the motion: "I don't think, on the facts of this case, at this stage of the game I have the discretion to grant bail pending appeal, and I surely would not, having not granted it prior to trial" (*see* Exhibit "C" annexed to appellant's motion). Indeed, Judge Sprizzo's summary denial, without making adequate written findings, is sufficient ground alone for a reversal of his order denying Pri-Har's release. In any event, even though a district court's findings are entitled to deference, this reviewing court must make an independent determination on the merits of the appellant's application. *Truong Dinh Hung v. United States*, 439 U.S. 1326, 1328-1329 (1978) (Brennan, J., as Circuit Justice).

APPELLANT DOES NOT POSE A RISK OF FLIGHT

The Government next claims that Pri-Har has failed to establish that he is not likely to flee, especially since "he has not cited any changed circumstances since his last bail appeal before this Court." McCormick Affirmation ¶ 22. To the contrary, Pri-Har has established in his moving papers not only that he does not pose a risk of flight, but that there also exists a changed circumstance because the Government previously opposed Pri-Har's prior bail applications on the stated ground that Pri-Har

had secreted assets around the world with which to facilitate his flight—a claim for which there was not a scintilla of documentary or evidentiary substantiation presented at the trial, prompting Judge Sprizzo to comment upon the lack of such evidence. *See* affidavit of Donald A. Harwood date May 27, 1994, in support of motion ("the Harwood Affidavit"), ¶¶ 47 through 51. While it is true Judge Sprizzo found, at sentencing, that Pri-Har had diverted in excess of one million dollars to his own personal use through a real estate loan issued by Bank of Tokyo, *see* McCormick Affirmation ¶ 25, this finding was premised solely upon the testimony of the Government's principal witness, Isaac Fattal—an admitted liar at Pri-Har's trial, *see* Harwood Affidavit ¶ 51—that Pri-Har had instructed a Diane LaBasse of Citibank to wire in excess of 5 million dollars to a personal account of Pri-Har's in Switzerland. Harwood Affidavit ¶ 49. There was not a shred of documentary evidence presented by the Government to corroborate Fattal's testimony at the sentencing hearing regarding this alleged transfer of funds from Citibank to a Swiss account, nor does the Government even mention in its papers—much less refute—the defense contention that no such transfer to a Swiss acount ever took place. Harwood Affidavit ¶ 50.[2] Equally important, the

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[2] In footnote 4 of the McCormick Affirmation, the Government cites additional evidence of allegedly diverted monies, upon which, the Government concedes, Judge Sprizzo did not make any findings. In any event, the 2.8 million loan from BNP-Geneva should not have been considered since the Government did not present any evidence at sentencing that this bank had been defrauded, resulting in Judge Sprizzo excluding the bank's alleged loss from his loss calculation (*see* Exhibit "E" to McCormick Affirmation, sentencing transcript, pp. 23-28, 61-64, 117-118). Regarding payments from Red Rock company accounts to Pri-Har's brother's personal bank account, the evidence at sentencing and at trial was that Pri-Har had been reimbursed, through his brother's account for which Pri-Har had power of attorney, for all of Red Rock employees' travel and related expenses which were billed every month to

Government has utterly failed to establish in its papers the existence of any funds *presently* available to Pri-Har to facilitate his flight.

Nor has the Government refuted Pri-Har's contention that he has every reason to remain in this country because of his substantial ties to this country, including his fiance, Barbara Breest, an American citizen, and their 2-year old son, and his desire to hold accountable those bank officials who falsely testified at his trial. Harword Affidavit ¶ 15. *Truong Dinh Hung v. United States,* 439 U.S. at 1326 (allowing release to convicted defendant, a Vietnamese citizen, because his appeal had merit and evidence did not establish a risk of flight in light of defendant's continuous residence within the country, ties in the community, and close relationship with sister who was an American citizen).

THE APPEAL POSES SUBSTANTIAL ISSUES OF LAW

A. *Rule 29 Motion*

Pri-Har's Rule 29 motion overwhelmingly establishes Pri-Har's innocence in that the evidence was legally insufficient as to each and every count of the indictment. In this regard, the defense also maintains that the testimony of the Government's principal witness, Issac Fattal, an admitted perjurer, upon which Pri-Har's conviction largely rests, was simply not worthy of belief, as is true of the testimony of numerous other bank officials, including Craig Tashjian of Standard Chartered Bank, whose testimony that Pri-Har orally misrepresented material facts was utterly belied by pertinent loan documents, some of

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Pri-Har's personal American Express and Diner's Club credit cards (Exhibit "E" to McCormick Affirmation, Fattal sentencing testimony, pp. 104-107; *see* trial testimony of Harry Dublinsky, Tr. 2622, 2624).

which expressly disclaimed reliance on contrary oral representations.[3]

B. *Rule 33 Motion*

Likewise, Pri-Har's Rule 13 motion convincingly establishes that he was deprived of the effective assistance of counsel because trial counsel did not advance numerous substantive defenses—*even though Pri-Har expressly directed counsel to raise such defenses in written summaries.* Nor was there any "tactical" reason for counsel's omission, as alleged by the Government, McCormick Affirmation ¶ 27, since the defenses and evidence Pri-Har directed trial counsel to raise were, in fact, elicited by the defense in the examination of witnesses during the trial.

C. *District Court's Instructions*

Attempting to refute the defense argument that the district court's instructions regarding wilfulness and knowledge were plain error in light of the Supreme Court's recent decision in *Ratzlaf v. United States,* 114 S.Ct. 655 (1994), the Government posits that the *Ratzlaf* decision, reversing and requiring a specific intent instruction for the offense of unlawfully structuring a bank transaction, is not applicable to the "general-intent" offenses for which Pri-Har was convicted. McCormick Affirmation ¶ 31. This Court apparently has not yet had the opportunity to determine whether the rationale of *Ratzlaf* should be so confined. Nevertheless, at least one circuit court, the Third Circuit, has held the rationale of *Ratzlaf* should not necessarily be confined to currency reporting cases, extending *Ratzlaf* and requiring reversal because of a deficient

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[3] Regarding Fattal's testimony, Judge Sprizzo observed during the trial that "There are some people who can't say anything straight" (Tr. 1654). Regarding Tashjian's testimony, Judge Sprizzo observed that the existence of the Red Rock/Olges contract was "some proof that suggests that maybe he [Tashjian] is not telling the truth on that" (Tr. 1777).

wilfulness instruction in a campaign fraud case under 18 U.S.C. Sec. 1005. *United States v. Curran*, 20 F.3d 560, 567-569 (3d Cir. 1994).[4] We contend *Ratzlaf* is fully applicable here, thus requiring a reversal on each and every count of the indictment.

D. *Evidentiary Rulings*

We maintain that numerous evidentiary rulings of the district court were patently unfair and require reversal, for reasons fully stated in our moving papers. Harwood Affidavit ¶¶ 31 through 45. Additionally, not only did Judge Sprizzo permit bank officials to testify regarding their interpretation of various loan documents while excluding testimony from defense witnesses on this precise point, Harwood Affidavit ¶¶ 32-33, he also permitted Government witnesses to "divine" what Pri-Har intended by certain statements or acts when the response was inculpatory (Fatttal Testimony, Tr. 361-362, 364, 366-67, 369, 1087-97), but then precluded such inquiry if the response was likely to be exculpatory (Fattal Testimony, Tr. 875; Rick Smith Testimony, Tr. 1481; Norman White Testimony, Tr. 3462-3465).[5]

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[4] Nor is defense counsel's failure to object of any consequence since the court's failure to properly instruct on an element of the crime constitutes plain error. *United States v. Curran*, 20 F.3d at 570; *United States v. Rogers*, 18 F.3d 265 (4th Cir. 1994) ("*Ratzlaf*-error" is plain error requiring reversal).

[5] The Government also suggests in a footnote that the authenticity of the defense-proffered foreign bank records was in question because it had proved certain defense proffered commodities contracts were forgeries. McCormick Affirmation ¶ 39 n. 6. Only *one* seller's signature on *one* contract was called into question, and the defense maintained that this signature was *not* a forgery, but rather, was authentic although a stamped-signature. The Government did not call any employees of Red Rock S.A. to establish the signature was forged. Further, the defense maintained the allegedly "forged" contract in fact reflected a large soybean shipment to Greece as confirmed by Government witnesses.

Lastly, the Government mistakenly contends that only the alleged error regarding the district court's instructions as to wilfulness and knowledge will affect all counts in the indictment. McCormick Affirmation ¶ 49. The district court's denial of Pri-Har's Rule 29 and 33 motions, principal issues advanced on appeal, also concern each and every count of the indictment.

CONCLUSION

Mr. Pri-Har, who steadfastly maintains his innocence, has no intention of fleeing and he is confident that his conviction will be reversed and that he will be fully vindicated on appeal. Mr. Pri-Har has suffered enough, having been incarcerated for over a year since his arrest and having been deprived of the love and company of his family, including his now two-year old son. In the interests of justice, we respectfully request that this motion be granted.

Respectfully submitted,

DONALD A. HARWOOD, ESQ.
Attorney for Defendant
Menachem Pri-Har
8 West 40th Street, Suite 900
New York, New York 10018
(212) 730-2689

Dated: New York, New York
June 10, 1994